Applicant Details

First Name	**Caitlin**
Middle Initial	**E**
Last Name	**Anderson**
Citizenship Status	**U. S. Citizen**
Email Address	**cea61@georgetown.edu**
Address	**Address** Street **3160 Riverside Dr, #403** City **Los Angeles** State/Territory **California** Zip **90027** Country **United States**
Contact Phone Number	**2067197341**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**February 2012**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 20, 2018**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal of Law & Modern Critical Race Perspectives**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Habeas, Immigration**

Recommenders

Soni, Munmeeth
meeth.soni@disabilityrightsca.org
McLeod, Allegra
mcleod@law.georgetown.edu
Wolfman, Brian
wolfmanb@law.georgetown.edu
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References

Prof. Brian Wolfman
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wolfmanb@georgetown.edu

Prof. Allegra McLeod
Georgetown University Law Center
please email
mcleod@law.georgetown.edu

Munmeeth Soni
Disability Rights California
(213) 213-8004
meeth.soni@disabilityrightsca.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CAITLIN ANDERSON
206.719.7341 • cea61@georgetown.edu
3160 Riverside Drive, Apt. 403, Los Angeles, CA 90027

May 2, 2022

The Honorable Elizabeth W. Hanes
Magistrate Judge
United States District Court for the
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am an alumna of Georgetown University Law Center. I write to apply for a clerkship in your chambers beginning in August 2022.

Enclosed please find a resume, a writing sample, my law school transcript, and a list of references. I am happy to provide additional information upon request.

Thank you for considering my application.

Respectfully,

Caitlin Anderson

CAITLIN ANDERSON

206.719.7341 ● cea61@georgetown.edu ● admissions: California (2019) & New York (pending)

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor; Public Interest Fellow — *2015 – 2018*
- Clinical Student, APPELLATE COURTS IMMERSION CLINIC
- Articles Editor, JOURNAL OF LAW & MODERN CRITICAL RACE PERSPECTIVES
- Report Co-author, HUMAN RIGHTS INSTITUTE FACT-FINDING PROJECT

COLUMBIA UNIVERSITY — **New York, NY**
Bachelor of Arts, Economics — *2008 – 2011*

EXPERIENCE

IMMIGRANT DEFENDERS LAW CENTER — **Los Angeles, CA**
Staff Attorney — *2019 – present*
- Briefed and argued immigration and criminal cases before the Ninth Circuit Court of Appeals and the California Court of Appeals.
- Developed legal strategy, drafted complaints and declarations, and briefed motions in federal impact litigation challenging denial of unaccompanied immigrant children's rights; prepared federal writs of habeas corpus and mandamus to challenge prolonged detention and compel USCIS adjudications.
- Represented unaccompanied children and incompetent adults in immigration court proceedings and before the Board of Immigration Appeals.

Post-Conviction Relief Fellow — *2018 – 2019*
- Prepared and litigated post-conviction motions to vacate immigration-adverse convictions in California courts.

FAIR TRIALS INTERNATIONAL — **Washington, DC**
Legal Intern — *Summer 2017*
- Wrote commentary on trial waiver systems and Supreme Court caselaw.
- Created database of Standing Rock protesters' criminal cases to document and assess release terms, disposition, access to counsel, and first amendment impact.

AMERICAN CIVIL LIBERTIES UNION — **Washington, DC**
Criminal Justice Extern, Washington Legislative Office — *Fall 2016*
- Drafted memoranda analyzing federal sentencing reform and police militarization incentives; reviewed protest footage to identify police tactics.

WASHINGTON APPELLATE PROJECT — **Seattle, WA**
Legal Intern — *Summer 2016*
- Drafted briefs for intermediate and state supreme courts on behalf of indigent defendants; engaged in case strategy sessions and attended oral argument.
- Drafted comment on proposed rule for imposing appellate costs on litigants.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON — **Seattle, WA**
Field Intern — *2014 – 2015*
- Gave presentations and drafted statements from stakeholders in support of campaigns to abolish capital punishment and reform legal financial obligations.

UNITED STATES PEACE CORPS — **Sierra Leone**
Secondary Mathematics Education Volunteer — *2014 (evacuated)*

COMMUNITY CONNECTIONS FOR YOUTH — **Bronx, NY**
Development Associate, Alternatives to Detention Project — *2012 – 2014*

COMMUNITY INVOLVEMENT & INTERESTS

Volunteer, **TAKING THE REINS** ● *Legal Observer,* **NLG** ● *my dog, Biscuit* ● *dance*

Record of: Caitlin E. Anderson
GUID: 837758594

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor May 20, 2018
Georgetown University Law Center
Major: Law

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2015							
LAWJ	001	93	Legal Process and Society Lawrence Solum	2.50	IP	0.00	
LAWJ	002	93	Bargain, Exchange and Liability Part I: Agreements Gregory Klass	3.00	A	12.00	
LAWJ	005	35	Legal Practice: Writing and Analysis Michael Cedrone	2.00	IP	0.00	
LAWJ	007	93	Property in Time David Super	4.00	B+	13.32	
LAWJ	009	32	Legal Justice Seminar Allegra McLeod	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	10.00	10.00	35.31	3.53
Cumulative	10.00	10.00	35.31	3.53

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2016							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	A-	18.35	
LAWJ	002	93	Bargain, Exchange and Liability Part II: Risks and Wrongs John Mikhail	3.00	B	9.00	
LAWJ	003	93	Democracy and Coercion David Cole	4.00	A	16.00	
LAWJ	005	35	Legal Practice: Writing and Analysis Michael Cedrone	4.00	A-	14.68	
LAWJ	008	93	Government Processes Jonathan Molot	4.00	B+	13.32	
LAWJ	611	02	Week One: Law in a Global Context: Extradition Martin Lederman	1.00	P	0.00	

Dean's List 2015-2016

	EHrs	QHrs	QPts	GPA
Current	21.00	20.00	71.35	3.57
Annual	31.00	30.00	106.66	3.56
Cumulative	31.00	30.00	106.66	3.56

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2016							
LAWJ	034	08	Human Rights Fact-Finding Fanny Gomez-Lugo	3.00	IP	0.00	
LAWJ	1187	05	Professional Responsibility: Problems from Practice Philip Schrag	3.00	B+	9.99	
LAWJ	165	05	Evidence Michael Gottesman	4.00	B	12.00	
LAWJ	235	07	International Law I: Introduction to International Law H. Thomas Byron	3.00	B+	9.99	
LAWJ	253	03	Civil Rights Externship Seminar Peter Romer-Friedman		NG		
LAWJ	253	86	~Seminar Peter Romer-Friedman	1.00	B+	3.33	
LAWJ	253	87	~Fieldwork Peter Romer-Friedman	2.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	11.00	35.31	3.21
Cumulative	44.00	41.00	141.97	3.46

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2017							
LAWJ	034	08	Human Rights Fact-Finding Fanny Gomez-Lugo	6.00	A	24.00	
LAWJ	1334	08	Justice and Accountability for International Atrocity Crimes: Bridging Theory and Practice Seminar Jane Stromseth	3.00	A-	11.01	
LAWJ	1334	30	Justice & Account for Inlt~WR Jane Stromseth		A-		
LAWJ	195	08	Election Law: Voting, Campaigning and the Law Paul Smith	3.00	B	9.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Susan Bloch	4.00	B+	13.32	

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	57.33	3.58
Annual	29.00	27.00	92.64	3.43
Cumulative	60.00	57.00	199.30	3.50

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Caitlin E. Anderson
GUID: 837758594

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2017							
LAWJ	049	05	Appellate Courts and Advocacy Workshop Brian Wolfman	2.00	A-	7.34	
LAWJ	504	05	Appellate Courts Immersion Clinic Brian Wolfman		NG		
LAWJ	504	30	~~Writing Brian Wolfman	4.00	B+	13.32	
LAWJ	504	80	~Research and Analysis Brian Wolfman	4.00	A	16.00	
LAWJ	504	81	~Advocacy and Client Relations Brian Wolfman	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	51.34	3.67
Cumulative	74.00	71.00	250.64	3.53

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2018							
LAWJ	032	05	Advanced Criminal Procedure and Litigation Abbe Lowell	2.00	B	6.00	
LAWJ	037	08	Immigration Law and Policy Andrew Schoenholtz	3.00	A-	11.01	
LAWJ	1175	08	Borders and Banishment Seminar Allegra McLeod	2.00	B+	6.66	
LAWJ	1454	08	Topics in LGBT Civil Rights Seminar Paul Smith	2.00	A-	7.34	
LAWJ	421	05	Federal Income Taxation Lilian Faulhaber	4.00	B+	13.32	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	44.33	3.41
Annual	27.00	27.00	95.67	3.54
Cumulative	87.00	84.00	294.97	3.51

End of Juris Doctor Record

GEORGETOWN LAW

Brian Wolfman
Professor from Practice
Director, Appellate Courts Immersion Clinic

May 1, 2022

Re: Clerkship recommendation for **Caitlin Anderson**

I enthusiastically recommend Caitlin Anderson for a clerkship in your chambers.

I met Caitlin in the fall semester of 2017 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. I worked with Caitlin every day for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even several meetings, but on an intensive, day-to-day working relationship in fall 2017. Since then, Caitlin and I have kept in touch, and I have followed Caitlin's career fairly closely.

I'll start with my bottom line: Caitlin would be an excellent law clerk. Caitlin's work in our clinic was uniformly strong. She analyzes legal problems carefully and accurately. She writes well and is a talented editor.

Catlin's legal skills were evident in both of her major clinic projects: (1) drafting a Supreme Court petition for certiorari in a case concerning whether *Brady v. Maryland* applies to plea bargaining, and (2) drafting the opening appellate brief in a complex case involving whether state law preempted a municipal ban on residential pesticide use. Both projects would have presented difficult challenges for experienced, capable lawyers. The records in both cases were large, and the legal issues were quite complex. Yet, working with two classmates, Caitlin was able to quickly understand the projects and produce

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PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

fine drafts. I was particularly impressed with Caitlin's ability to transform general feedback from me and others into first-rate work product.

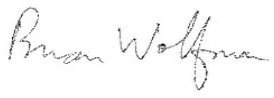
As noted earlier, I have kept up with Caitlin since her graduation in 2018. She's accomplished a lot since then, doing meaningful, challenging litigation in settings where she's been given considerably more responsibility than is given to most new lawyers. Recently, I witnessed Caitlin's legal work up close. Caitlin asked me to be a moot-court judge in a case she would soon be arguing in the Ninth Circuit. Both her briefs and her moot-court performance were excellent. I was particularly impressed with her ability to recognize and respond to questions that exposed the gaps and ambiguities in the case. (I later listened to the actual argument, and, not surprisingly, she did an excellent job.) Caitlin was a capable lawyer when I knew her as a law student, but this recent experience drove home just how much she has grown in the last four years—and just how valuable she would be as a law clerk. I'm confident that she would bring to judicial chambers something that most law clerks don't have: the skills, judgment, and know-how of a practicing lawyer. Add that to the analytical prowess that she brought to bear in our clinic, and you would have something special.

* * *

Beyond Caitlin's intellectual and professional attributes, a few of her other qualities bear mention. Caitlin is honest and forthright. She is serious and grounded and works hard. But she doesn't take herself too seriously. She has a lovely personality and a fine sense of humor. For these reasons as well, I think she'd be an excellent addition to any judicial chambers.

I'll end where I began: I strongly recommend Caitlin Anderson for a clerkship. If you would like to talk about Caitlin, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

CAITLIN ANDERSON
206.719.7341 • cea61@georgetown.edu

Writing Sample I

Enclosed is a self-edited excerpt of an opening brief. The brief addresses an issue raised in a petition for review of a Board of Immigration Appeals decision before the Ninth Circuit Court of Appeals. The petitioner's name and other identifying information have been changed to protect his identity.

INTRODUCTION

In the 1980 Refugee Act, the United States pledged to protect noncitizens from exile to countries where their "life or freedom would be threatened." 8 U.S.C. § 1231(b)(3). It owes that protection, called "withholding of removal," to any person who can demonstrate two things: he has not been convicted of a "particularly serious crime" (PSC), and he will "more likely than not" be persecuted in his country of nationality. *Id.*; *see also* 8 C.F.R. § 1208.16(b)(2).

Petitioner Calvin Nyambura offered compelling evidence that he merits this relief. He arrived from Kenya at age eleven and has lived here as a lawful permanent resident for over two decades. As a young man, he developed a severe mental illness that spurred his teenage participation in a robbery and later stripped him of his ability to perform the most basic acts of daily life. As hard as it has been to manage his condition in the United States, it is nothing to what he would suffer in Kenya. People with mental illnesses endure severe persecution by Kenyan authorities.

The United States nonetheless intends to deliver Calvin into their hands. An Immigration Judge (IJ) and the Board of Immigration Appeals (Board) denied Calvin's application for withholding of removal on the grounds that his robbery conviction was "particularly serious." That determination contravened settled Board and Ninth Circuit precedent. Instead of engaging in the required case-by-case analysis, the PSC finding turned exclusively on the elements of the offense, ignored the "sentence" Calvin served in California Youth Authority custody, and disregarded the "circumstances and underlying facts" that led a sixteen-year-old to help his neighbor steal twenty dollars and a cellphone. *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). To correct this perversion of PSC doctrine and restore Calvin's eligibility for relief, this Court must grant his petition for review and remand.

ISSUE PRESENTED

Whether the IJ and the Board (together, the Agency) abused their discretion when they deemed Calvin's offense particularly serious based solely on its elements and without considering all the *Frentescu* factors.

STATEMENT OF FACTS

On April 22, 2000, eleven-year-old Calvin and his family left Kenya and came to the United States as lawful permanent residents. AR 763. They moved to California, where Calvin and his siblings enrolled in school. AR 1936.

On January 21, 2005, sixteen-year-old Calvin was in front of his Los Angeles apartment with his neighbor, Jacob. AR 314. Jacob was a few years older, and Calvin looked up to him, so when Jacob took off on his skateboard, Calvin followed. AR 314, 319. When he caught up to him, Jacob was robbing a group of their "peers" they knew from the basketball court. AR 315. Jacob asked the group for their money and then "thr[e]w a punch at [one of] them." AR 315. He pointed to one of the young men and told Calvin to "check his pockets." AR 315. Calvin "didn't want [the young man] to get punched too," so he patted him down. AR 330. He found a cell phone and twenty dollars, which Jacob pocketed. AR 316, 327.

Jacob then headed toward his sister's apartment complex, and Calvin followed. AR 317. As they neared the gates, Jacob saw another group of their "peers." AR 317. Jacob demanded money from them, but Calvin intervened. AR 317. He told Jacob to "[j]ust leave them alone," and Jacob backed down. AR 317–18. Calvin never threatened anyone, and neither he nor Jacob were carrying weapons. AR 318.

Calvin was arrested and charged with robbery under section 211 of the California Penal Code. AR 826–31. He did not explain his role in the events to the police or the court. *See* AR 359. He simply pleaded no contest and was sentenced to three years in California Youth Authority custody, where he finished high school and trained to be a firefighter. AR 326, 826–31, 951, 2156.

A few years later, Calvin was diagnosed with psychotic and mood disorders. AR 301. He had long been bullied by children at school because of things he said. AR 330. Medical records suggest that these were early signs of his mental illness. *See* AR 1133.

STATEMENT OF THE CASE

The Department of Homeland Security initiated removal proceedings against Calvin based on his robbery conviction. AR 2154–56. Calvin's severe mental illness prevented him from representing himself in his removal proceedings, so the IJ appointed him counsel. AR 101. Counsel filed an application for withholding of removal on Calvin's behalf. *See* AR 1933–42.

The IJ concluded that Calvin was barred from seeking withholding of removal because his robbery conviction constituted a particularly serious crime. AR 111. To begin, she summarized the PSC evidence presented, including Calvin's credible testimony describing what happened. AR 111–12.

Then, in her PSC analysis, she repeatedly dismissed those facts and focused instead on the elements of section 211. For example, she noted that "[d]espite [Calvin's] alleged limited role, in order to be convicted under [] section 211, the government must prove" the elements as listed in the jury instructions. AR 112. Similarly, "[w]hile [she] acknowledge[d] [Calvin's] testimony that he did not use force or fear to check the victim's pockets, [she] c[ould]not overlook that [Calvin] was nonetheless charged, accepted a plea deal, convicted, and sentenced under a state statute that required the defendant to have taken property from the victim using fore [sic] or fear." AR 112. Finally, the IJ found that Calvin's "mental health was not impaired at the time of the crime," and did not consider other evidence relevant to his "motive" or "intent." AR 112 (citing *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018)).

On appeal to the Board, Calvin argued that the IJ legally erred by placing undue weight on section 211's elements and ignoring material mitigating evidence including Calvin's age at the time of the offense. AR 18–21. The Board affirmed the IJ's PSC finding, noting that "'crimes against persons' are more likely to be categorized as particularly serious" and claiming the IJ had "considered [Calvin]'s testimony regarding the events surrounding the robbery and his involvement." AR 3–4.

STANDARD OF REVIEW

Whether the Court reviews the Board's or the IJ's decision depends on the standard of review the Board used. If the Board "conduct[ed] its own review of the evidence and law," the Court reviews only the Board's decision. *Guerra v. Barr*, 974 F.3d 909, 911 (9th Cir. 2020). Conversely, if the Board reviewed the IJ's decision for abuse of discretion, the Court reviews only the IJ's decision. *Rojas v. Holder*, 704 F.3d 792, 794 (9th Cir. 2012). Where, as here, the standard of review the Board used is unclear, the Court reviews both; it "look[s] to" the IJ's decision as a "guide to what lay behind" the Board's conclusions. *Benyamin v. Holder*, 579 F.3d 970, 974 (9th Cir. 2009).

The Court reviews Agency PSC determinations for "abuse of discretion." *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019). The Agency abuses its discretion if it incorrectly applies the legal standard or relies on inappropriate evidence or factors to make its decision. *Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1230–31 (9th Cir. 2021).

SUMMARY OF THE ARGUMENT

A particularly serious crime is an absolute bar to withholding of removal. Congress reserved "such severe consequences for those criminal offenses that make a[noncitizen] so 'danger[ous] to the community of the United States' that we are not willing to keep him here, notwithstanding the persecution he may face at home." *Delgado v. Holder*, 648 F.3d 1095, 1109 (9th Cir. 2011) (Reinhardt, J., concurring) (quoting 8 U.S.C. § 1231(b)(3)).

Inexplicably, the Agency concluded that Calvin's childhood transgression was one of these dangerous offenses. Its professed case-by-case determination reflects two complementary errors. First, the Agency improperly focused on the elements of Calvin's conviction, effectively designating robbery a *per se* PSC. Second, it failed to consider the facts and circumstances of Calvin's offense. By departing from its own standards, the Agency abused its discretion, and the Court must therefore vacate and remand. *Alcaraz-Enriquez*, 19 F.4th at 1230–31.

ARGUMENT

A. The Court Must Remand Because the Agency Impermissibly Rested Its PSC Finding on the Elements of the Offense

Congress, the Board, and this Court agree: the Agency is not free to create new categories of *per se* PSCs. *Blandino-Medina v. Holder*, 712 F.3d 1338, 1345 (9th Cir. 2013). But the Agency did just that when it concluded that Calvin's conviction was particularly serious based solely on its elements. This legal error requires remand. *Alcaraz-Enriquez*, 19 F.4th at 1230–31.

1. The Agency Cannot Create New Categories of Per Se PSCs

A small group of crimes are intrinsically, or *per se*, particularly serious. Under the Immigration and Nationality Act (INA), an offense qualifies as a *per se* PSC if it carries a five-year sentence and its elements "match" one of the "generic" aggravated felony crimes listed in the statute.[1] *Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020); 8 U.S.C. § 1231(b)(3)(B)(iv) (defining *per se* PSCs); *see* 8 U.S.C. § 1101(a)(43) (defining aggravated felonies). Put simply, Congress made a list of *per se* PSCs defined by their elements, and it did not empower the Agency to revise that list. Both the INA's text and its

[1] This definition applies to withholding of removal. A different *per se* PSC definition applies to asylum.

silence thus "compel the conclusion" that the Agency cannot expand the *per se* PSC umbrella to cover new crimes. *Blandino-Medina*, 712 F.3d at 1345.

Every offense that is not *per se* particularly serious is evaluated on a "case-by-case" basis to determine whether the evidence justifies a PSC finding. *Delgado*, 648 F.3d at 1107. That analysis looks at three factors: 1) the nature of the conviction, 2) the circumstances and underlying facts, and 3) the type of sentence imposed. *Matter of Frentescu*, 18 I. & N. Dec. at 247. First, the Agency asks whether the "nature of the conviction"—that is, its elements—puts it in the "'category'" of potential PSCs. *Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020) (quoting *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (B.I.A. 2007), *overruled in part on other grounds by Blandino-Medina*, 712 F.3d at 1347–48). If it clears that threshold, then the Agency looks to evidence of the "circumstances and underlying facts" and the "type of sentence imposed." *Matter of Frentescu*, 18 I. & N. Dec. at 247. Only after considering what the applicant "actually did," *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018), his "motivation and intent," *Gomez-Sanchez*, 892 F.3d at 996, and the "gravity" of the crime, *Matter of N-A-M-*, 24 I. & N. Dec. at 343, may the Agency find a conviction particularly serious.

Under Board precedent, then, the elements of a conviction should never be decisive. Rather, the decisive evidence must "separate [the applicant's conviction] from an analysis regarding any other person's conviction for the same offense." *Afridi v. Gonzales*, 442 F.3d 1212, 1220 (9th Cir. 2006), *overruled on other grounds by Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008). That is, the PSC finding must turn on facts specific to the applicant that make the offense *more serious* than the elements of the conviction alone.

In line with this framework, the Court categorically prohibits the Agency from abandoning the second and third *Frentescu* factors. *Blandino-Medina*, 712 F.3d at 1345–46. When the Agency violates that rule and rests a PSC finding on a conviction's elements, it makes every other conviction under the same statute a PSC *per se*. *Id.* And, of course, the Agency cannot create new *per se* PSCs. *Id.* at 1344.

Accordingly, the Court vacates PSC findings that turn on a conviction's elements. In *Blandino-Medina*, for example, the Court vacated and remanded a PSC finding because the Agency examined only "the elements of Section 288(a) . . . without examining the facts and circumstances of Blandino's conviction" or his sentence. 712 F.3d at 1340–41. And in *Afridi*, the Court vacated a PSC determination that rested on the elements and the sentence

but not the facts. 442 F.3d at 1219. The Agency's failure to cite any evidence that "separate[d]" Mr. Afridi's offense from any other person's proved that it denied him a full case-by-case analysis. *Id.*

The Court intervenes even where the Agency's improper reliance on the elements is implicit. In *Flores-Vega*, the Court vacated a PSC finding after the Agency disregarded the only evidence of the facts and circumstances in the record—Mr. Flores-Vega's testimony. 932 F.3d at 885–86. The Agency reasoned that Mr. Flores-Vega had "'likely induced great fear in his victim'" and inflicted "'bodily harm'" on her. *Id.* at 885. But since the Agency had "no evidence of the victim's subjective fear or bodily harm," those justifications were "pure conjecture." *Id*. The Court held that the Agency improperly "relied on the elements of the crime and then imagined facts that might have existed to support the conviction." *Id.*

The Board's and this Court's precedent thus dictate that the Agency abuses its discretion when, explicitly or not, it rests a PSC finding on the elements of an offense to the exclusion of the other *Frentescu* factors. *See id.*

2. The Agency's PSC Finding Rested Solely on the Elements of the Conviction

The Agency improperly applied the PSC standard here. Calvin's conviction was not a *per se* PSC, so he was entitled to a full *Frentescu* analysis. But the Agency gave short shrift to the two decisive *Frentescu* factors: the "circumstances and underlying facts" and the "sentence imposed." *Matter of Frentescu*, 18 I. & N. Dec. at 247; *see* AR 3, 111. As both the IJ and Board decisions demonstrate, the Agency rested its PSC determination on the elements of section 211 alone.

The Agency had before it credible testimony describing the facts and circumstances that led to Calvin's conviction and sentence. *See* AR 111 (credibility finding). Sixteen-year-old Calvin saw his older neighbor, Jacob, demand money from a group of kids and punch one of them. AR 314–15. Jacob told Calvin to pat down one of the victims, and he complied; Jacob kept the cellphone and twenty dollars cash he found. AR 315–16, 327, 330. Jacob then approached another group of kids, but Calvin told him to "leave them alone," and Jacob backed down. AR 317–18. Calvin never harmed or threatened anyone, and he had no weapon. AR 318. For his role in the incident, Calvin accepted a plea with a three-year sentence in California Youth Authority custody. AR 826–31.

The IJ disregarded this evidence. *See* AR 112. She ignored Calvin's sentence altogether, and she used the elements of section 211 to dismiss the facts and circumstances. *See* AR 112. She observed that "[d]espite [Calvin's] alleged limited role, in order to be convicted under [] section 211, the government must prove" the elements as listed in the jury instructions. AR 112. And "[w]hile [she] acknowledge[d] [Calvin's] testimony that he did not use force or fear to check the victim's pockets, [she] c[ould]not overlook that [Calvin] was nonetheless charged, accepted a plea deal, convicted, and sentenced under a state statute that required the defendant to have taken property from the victim using fore [sic] or fear." AR 112. In these passages, the IJ improperly "relied on the elements of the crime," *Flores-Vega*, 932 F.3d at 885, to reject all the evidence of what Calvin "actually did," *Guerrero*, 908 F.3d at 545, and his "intent," *Gomez-Sanchez*, 892 F.3d at 996. As a result, her decision was bereft of facts that would "separate [Calvin's conviction] from an analysis regarding any other person's conviction for the same offense," let alone make it *more serious*. *Afridi*, 442 F.3d at 1220.

The Board doubled down on the IJ's flawed analysis. It gave two justifications for dismissing Calvin's appeal, both of which missed the point. First, the Board asserted that the IJ's summary of Calvin's testimony to his "involvement" proves she considered it. *See* AR 4. Her blatant dismissal of his account is enough to refute that. *See* AR 112 (using the elements of the offense to dismiss the facts).

Second, the Board defended the IJ's decision on the grounds that "'crimes against persons' are more likely to be categorized as [PSCs]." AR3, 111. That does not remedy the IJ's improper application of *Matter of Frentescu*. What's more, in support of that proposition, the Board cited precedent cases that either: 1) correctly considered the facts, not just the elements, of the "crime against persons" as required by this Court;[2] or 2) have been overruled by this Court because the Board incorrectly found a conviction particularly serious

[2] *See Matter of R-A-M-*, 25 I. & N. Dec. 657 (B.I.A. 2012); *Matter of L-S-*, 22 I. & N. Dec. 645 (B.I.A. 1999); *Matter of Frentescu*, 18 I. & N. Dec. 244; *Matter of L-S-J-*, 21 I. & N. Dec. 973 (B.I.A. 1997).

based solely on its elements.[3] These cases only bolster Calvin's argument that the Agency was required to consider more than the elements of his offense.

Together, the Agency's decisions reflect the same overreliance on the elements that this Court corrected in *Afridi*, 442 F.3d at 1219, *Blandino-Medina*, 712 F.3d at 1348–49, and *Flores-Vega*, 932 F.3d at 885–86. As it stands, Calvin's PSC determination turns every robbery conviction into a *per se* PSC—a gross transgression of Agency authority. *See Blandino-Medina*, 712 F.3d at 1344–47. The Court must therefore vacate and remand for the Agency to engage in a full *Frentescu* analysis. *Alcaraz-Enriquez*, 19 F.4th at 1230–31, 1233 (remanding where the Board legally erred in its PSC analysis).

B. The Court Should Direct the Agency to Consider All *Frentescu* Factors and Evidence on Remand

Part and parcel of the Agency's improper reliance on the elements is its failure to consider the "circumstances and underlying facts" and the "type of sentence imposed." *Matter of Frentescu*, 18 I. & N. Dec. at 247. On remand, the Agency must grapple with the totality of Calvin's evidence. *See Matter of N-A-M-*, 24 I. & N. Dec. at 338 (directing Agency to consider "all reliable information" when analyzing PSCs).

First, the Agency must consider the only evidence of Calvin's role in the incident—his testimony. *See Guerrero*, 908 F.3d at 545 (explaining that PSC analysis focuses on applicant's conduct). In her haste to find Calvin's offense particularly serious based on its elements, the IJ discounted his testimony in part based on a misapprehension of California law. She rejected Calvin's description of his "limited role" because he was "convicted . . . under a state statute that required the *defendant*" to use force or fear. AR 112 (emphasis added). But the statute of conviction operates more broadly. In California, accomplices and accessories are liable as principles, so a person may be convicted of a crime without engaging in conduct that fulfills every element. Cal. Penal Code § 31. To charge Calvin under section 211, the prosecutor needed to show only that *someone* used force or fear to take property from the victims, not that Calvin did. *See id.* Calvin's testimony showed exactly that: Jacob punched one of the victims; Calvin patted one of them down and turned

[3] *See Matter of N-A-M-*, 24 I. & N. Dec. 336, *overruled by Blandino-Medina*, 712 F.3d 1338, *as recognized by Bustos-Bustos v. Garland*, 845 F. App'x 600 (9th Cir. 2021).

over the property he found. AR 315–16, 327, 330. Although state criminal law punishes Calvin for Jacob's violence, PSC doctrine does not. A PSC finding hinges on what the defendant "actually did," and Calvin never used force or fear. *Guerrero*, 908 F.3d at 545; *see* AR 314–15. His credible testimony to those facts is key *Frentescu* evidence, so the Agency must consider it on remand. *See Afridi*, 442 F.3d at 1219.

Second, the Agency must consider Calvin's mental health. Before the incident that led to his conviction, other children at school bullied Calvin because of things he said. AR 330. Medical records connect these early signs to the symptoms of his psychotic and mood disorders that he was first diagnosed with years later. *See* AR 1133. Calvin's impairments impacted his "intent" and must be factored into the PSC analysis. *Gomez-Sanchez*, 892 F.3d at 996 (holding that mental health is relevant to PSC determination).

Third, the Agency must consider the nature of Calvin's sentence. *Matter of Frentescu*, 18 I. & N. Dec. at 247. Calvin's case was filed in adult court under "tough-on-crime" era laws that gave California prosecutors "'unfettered discretion'" to try children as adults on a number of offenses. Juleyka Lantigua-Williams, *Treating Young Offenders Like Adults Is Bad Parenting*, Atlantic (Sep. 9, 2016), https://www.theatlantic.com/politics/archive/2016/09/direct-file-in-california-and-prop-57/498641/ (quoting Marcy Mistrett, Campaign for Youth Justice); *see* Univ. Cal., Hastings Coll. L., *Voter Information Guide for 2000, Primary* 127–28 (2000), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2187&context=ca_ballot_props (Proposition 21 text providing direct file authority); AR 826–31. Those laws have since been rolled back, but not in time to spare Calvin. *See* Cal. Dep't Corr. Rehab., *Proposition 57: The Public Safety and Rehabilitation Act of 2016 Frequently Asked Questions* (2022), https://www.cdcr.ca.gov/blog/proposition-57-the-public-safety-and-rehabilitation-act-of-2016-frequently-asked-questions/. He was pushed through the adult system and, like "'almost all'" children subject to direct file, he accepted a plea. Lantigua-Williams, *supra* (quoting Mistrett); *see* AR 826–31.

Notably, the court ordered Calvin to serve his sentence in California Youth Authority custody, instead of adult prison. *See* AR 826–31. Only youth found "amenable" to the "training and treatment offered by the Youth Authority" can serve their sentences there; youth found "unsuitab[le]" must serve their time in adult prisons. *People v. Carl B.*, 24 Cal. 3d 212, 217–18 (Cal. 1979). Calvin's Youth Authority sentence thus reflects the judicial system's confidence that he did not deserve the harsher penalty of prison time, and the Agency must factor that into its evaluation of his sentence on remand. Just

as it distinguishes between probation, house arrest, and prison terms, it should distinguish between Youth Authority and adult prison sentences. *See Estrada-Martinez v. Lynch*, 809 F.3d 886, 893 (7th Cir. 2015) (describing as "cogent" petitioner's distinction between probationary and prison sentences in PSC analysis).

Fourth and finally, the Agency must consider Calvin's age at the time of the offense. As "any parent knows," *Roper v. Simmons*, 543 U.S. 551, 569 (2005), "children generally are less mature and responsible than adults; [] they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; [and] they are more vulnerable or susceptible to outside pressures than adults," *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (cleaned up). For these reasons, a defendant's age impacts his mental state and intent. *Weeden v. Jacobson*, 854 F.3d 1063 (9th Cir. 2017) (faulting defense counsel for failing to present evidence of defendant's age and maturity to undermine specific intent). Since intent is an important piece of the PSC analysis, the Agency must grapple with Calvin's age and how it mitigates the seriousness of his offense. *See Matter of L-S-*, 22 I. & N. Dec. at 655–56 (relying on the applicant's lack of intent to harm to find that his conviction was not particularly serious).

Only after weighing this evidence may the Board decide whether Calvin's teenage misstep forecloses him from seeking protection from threats to his life and freedom.

CONCLUSION

The Agency improperly relied on the elements of Calvin's conviction to find it particularly serious. The Court must therefore vacate and remand for the Agency to consider the full suite of evidence contemplated by *Matter of Frentescu*.

Applicant Details

First Name	**Brittany**
Last Name	**Appleby-Rumon**
Citizenship Status	**U. S. Citizen**
Email Address	**baa52@georgetown.edu**
Address	**Address** Street **1011 4th Street N.W.** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**240-382-7325**

Applicant Education

BA/BS From	**Stevenson University**
Date of BA/BS	**June 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 4, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hamann, Kristine
khamann@pceinc.org
Paul, Rothstein
Paul.Rothstein@law.georgetown.edu
202.662.9094
Wagner, Katharine
katharine.wagner@usdoj.gov
2022629589

References

Kristine Hamann
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917-885-9065

Paul Rothstein
Paul.Rothstein@law.georgetown.edu
202-662-9094

Katharine Wagner
katharine.wagner@usdoj.gov
202-262-9589

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BRITTANY APPLEBY-RUMON

1011 4th St. N.W., Apt. 603 baa52@georgetown.edu
Washington, D.C. 20001 240-382-7325

The Honorable Magistrate Judge Elizabeth W. Hanes June 14, 2021
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street, Richmond, VA 23219

Dear Judge Hanes,

I am enthusiastically writing to apply for a 2022-2024 term clerkship in your chambers. I have a strong interest in clerking for the United States District Court for the Eastern District of Virginia. I am thrilled for the opportunity to clerk for the "Rocket Docket." I believe my experience as a paralegal for the U.S. Department of Justice working with Assistant U.S. Attorneys from EDVA and managing multiple complex cases has prepared me well to contribute to your chambers and this unique district.

I am a fourth-year evening student at Georgetown University Law Center and full-time paralegal specialist at the U.S. Department of Justice in the Narcotic and Dangerous Drug Section. As a paralegal I am assigned to twenty-eight different operations, each involving multiple defendants, and I report to fifteen trial attorneys. I assist with cases at every stage, from investigation through sentencing.

My experience at DOJ has taught me to work towards a mission of justice, not a specific result. Last fall I was assigned to draft a response to a compassionate release motion that claimed the defendant's son had no caretaker. The son's mother and uncle were murdered, and he was frequently passed among extended family members who feared if he was in their care it would attract his father's enemies. The defendant had served close to half of a 25-year sentence for conspiring to import over 1,500 kilograms of cocaine into the U.S. An opposition response could keep a parent from his child and an unopposed response could release a repeat offender into the community. Before taking a position, I dug into the facts of the decades-old case. The sentencing judge had concluded the defendant organized the cocaine shipment and case law largely undermined the defendant's claim that he was the only available caretaker. After comprehensive review of the sentencing factors and framework, I drafted a response recommending opposition. My supervisor agreed. Ultimately the federal district court judge denied the defendant's motion and the order extensively quoted the opposition response. I understand the gravity of the work before the court and I will bring that understanding to this position to help ensure hard decisions lead to just results.

I am happy to meet with you to discuss how I might contribute to your chambers as a clerk. Enclosed with this application are my resume, transcripts, and writing sample for your review. Also enclosed are recommendation letters from Professors Paul Rothstein and Kristine Hamann, and a supervisor, U.S. Department of Justice Trial Attorney, Katharine Wagner. Please do not hesitate to contact me if you have questions or if I can provide further information. I am available by email at baa52@georgetown.edu or by phone at (240) 382-7325. Thank you for your consideration and time.

Sincerely,

Brittany Appleby-Rumon

Enclosures:
Resume
Transcript
Writing Sample
Recommendation letters (3)

BRITTANY APPLEBY-RUMON

1011 4th St. N.W., Apt. 603 baa52@georgetown.edu
Washington, D.C. 20001 240-382-7325

EDUCATION

Georgetown University Law Center, Washington, D.C.
J.D., expected May 2022
GPA: 3.43 *Section 3 Curriculum*
Activities: Human Rights Associates Program, Public Interest Fellow, Women's Legal Alliance, Hoya Lawya Runners
Pro Bono: Veterans Consortium Legal Clinic, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Prosecutors' Center for Excellence

Stevenson University, Stevenson, MD
B.S., *summa cum laude*, in Legal Studies, minor in Economics, June 2018
GPA: 3.99
Honors: Provost's Award for Exceptional Scholarship (2018), Scholarship for Excellence in Business (2016), Scholarship for Excellence in Legal Studies (2015), Presidential Fellowship (2014), Lambda Epsilon Chi Paralegal Honor Society, Sigma Alpha Pi
Activities: Student Government Association, *Senior Class President* (2014-2018); Legal Society, *President* (2014-2018); Student United Way, *Member* (2014-2018); Mock Trial Competition Team, *Captain* (2015-2016); Annual Giving, *Student Assistant* (2014-2018); Service Learning Abroad: Quito, Ecuador (2018)

EXPERIENCE

Department of Justice, Criminal Division, Narcotic and Dangerous Drug Section, Washington, D.C.
Paralegal Specialist, August 2019 – Present (*full-time*)

- Assist in initial discovery collection through drafting Mutual Legal Assistance Treaty (MLAT) requests, grand jury subpoenas, preservation letters, search warrant and pen register applications, and 2703(d) motions and accompanying orders
- Assemble indictment and extradition packages, prepare trial exhibits and discovery productions, edit and Shephard citations in sentencing and opposition responses and status reports, correspond with Court and clerks to arrange execution of affidavits
- Draft internal memos for maritime unit to address potential defense claims and government responses in prosecuting persons interdicted trafficking drugs in international waters, work with senior counsel to assign cases to competing U.S. Attorneys' Offices, coordinate with agencies and U.S. Attorneys' Offices to plan maritime conferences and national narcotics seminars

Prosecutors' Center for Excellence, Washington, D.C.
Law Clerk, June 2021-Present (*part-time*)

- Research and compare states' approaches to expungement and sealing, and facilitate organization's conferences and meetings

Georgetown Law Journal, Annual Review of Criminal Procedure, Washington, D.C.
Research Assistant, May 2020 – August 2020

- Researched habeas relief for state prisoners to ensure the main text's citations were technically and substantively accurate
- Located and summarized most recent decisions to revise citations and assign substance to text and footnotes in the form of parentheticals to incorporate developments in the law and note circuit splits

District of Columbia Office of Human Rights, Washington, D.C.
Regulatory Law Clerk, June 2019 – August 2019

- Drafted regulations for implementing the D.C. Fair Criminal Record Screening Amendment Act
- Reviewed administrative law judges' orders and decisions to ensure conclusions were amply supported
- Drafted memos interpreting regulations that implement the Human Rights Act in light of recent case law

Pamela R. Chaney, Esq., LLC, Catonsville, MD
Paralegal, June 2017 – August 2018

- Drafted motions, pleadings, and documents in the areas of corporate governance, family law, and tax law including orders for guardianship, wills, power of attorney (POAs), petitions for attorney expenses, and demand letters on behalf of landlords
- Assisted new business owners draft and file paperwork for registering LLCs and corporations and develop file retention policies, employment agreements, and terms of use for websites

Under Armour, Legal Department: Trademarks Division, Baltimore, MD
Summer Intern, June 2017 – August 2017

- Coordinated the organization of over one thousand Federal and international trademarks
- Ran USPTO screenings and filed trademark applications for sports apparel and equipment style names and graphic verbiage

Confidential Professional Investigative Services Group, Inc., Catonsville, MD
Administrative Assistant, June 2017 – August 2018

- Assisted law professor in launching and registering corporation through drafting corporate bylaws, filing articles of incorporation, managing the stock transfer ledger, and securing necessary professional and business licenses

U.S. House of Representatives, Congressman John K. Delaney, Hagerstown, MD
Summer Intern, May 2016 – August 2016

- Researched and presented prospective legislation in areas of veterans' affairs and sexual assault
- Organized and facilitated constituent service events including entrepreneurship workshops and veteran services one-stop shops across Maryland, corresponded with constituents in writing and in-person

Record of: Brittany Alexandria Appleby-Rumon
GUID: 800367679

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	93	Legal Process and Society Lawrence Solum	2.50	IP	0.00	
LAWJ	002	93	Bargain, Exchange & Liability David Super	3.00	IP	0.00	
LAWJ	005	32	Legal Practice: Writing and Analysis Susan McMahon	2.00	IP	0.00	
LAWJ	007	31	Property in Time Daniel Ernst	4.00	B	12.00	
LAWJ	009	35	Legal Justice Seminar David Luban	3.00	B	9.00	

	EHrs	QHrs	QPts	GPA
Current	7.00	7.00	21.00	3.00
Cumulative	7.00	7.00	21.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	B+	16.65	
LAWJ	002	93	Bargain, Exchange and Liability Part II: Risks and Wrongs David Super	6.00	B	18.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	B	12.00	
LAWJ	005	32	Legal Practice: Writing and Analysis Michael Cedrone	4.00	A-	14.68	
LAWJ	008	93	Government Processes Jonathan Molot	4.00	B+	13.32	

	EHrs	QHrs	QPts	GPA
Current	23.00	23.00	74.65	3.25
Annual	30.00	30.00	95.65	3.19
Cumulative	30.00	30.00	95.65	3.19

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	126	07	Criminal Law John Hasnas	3.00	A-	11.01	
LAWJ	1533	05	Civil Discovery in Federal Courts Michael Madigan	3.00	A-	11.01	
LAWJ	410	07	Local Government Law Adrian Gardner	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	9.00	9.00	32.01	3.56
Cumulative	39.00	39.00	127.66	3.27

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	165	07	Evidence Mushtaq Gunja	4.00	P	0.00	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties Jeffrey Shulman	4.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	8.00	0.00	0.00	0.00
Annual	17.00	9.00	32.01	3.56
Cumulative	47.00	39.00	127.66	3.27

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2020							
LAWJ	037	10	Immigration Law and Policy Paul Schmidt	2.00	A-	7.34	
LAWJ	361	06	Professional Responsibility Stuart Teicher	2.00	A-	7.34	

	EHrs	QHrs	QPts	GPA
Current	4.00	4.00	14.68	3.67
Cumulative	51.00	43.00	142.34	3.31

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	121	07	Corporations Charles Davidow	4.00	B+	13.32	
LAWJ	1354	05	Best Practices for Justice: Prosecutors Working to Improve the Criminal Justice System Kristine Hamann	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	8.00	8.00	28.00	3.50
Cumulative	59.00	51.00	170.34	3.34

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	032	07	Advanced Criminal Procedure Mark Biros	2.00	A	8.00	
LAWJ	168	07	Advanced Evidence: Supreme Court and the Constitution Seminar Paul Rothstein	3.00	A	12.00	
LAWJ	455	97	Federal White Collar Crime Robert Cary	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	8.00	8.00	32.00	4.00
Annual	20.00	20.00	74.68	3.73
Cumulative	67.00	59.00	202.34	3.43

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2021							
In Progress:							
LAWJ	1491	56	Externship I Seminar (J.D. Externship Program)	3.00	In Progress		

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current				
Cumulative	67.00	59.00	202.34	3.43

End of Juris Doctor Record

PROSECUTORS' CENTER FOR EXCELLENCE

May 8, 2021

Re: Brittany Appleby-Rumon

Dear Judge,

It is my great pleasure to recommend Brittany. I have known her since she was a student in my Fall 2020 practicum class at Georgetown entitled "Best Practices for Justice: Prosecutors Working to Improve the Criminal Justice System." The class includes weekly seminars on policy issues related to prosecution, plus a writing requirement. Since the class is small, I got to know Brittany well through her class participation and her written work. Her class participation was engaged and appropriate. For her writing assignment, Brittany chose to write on how to enhance witness cooperation; her research and writing was excellent. To conclude the class, Brittany gave a presentation on her subject to the class and demonstrated that she is articulate and poised.

It is important to note that Brittany works full-time while attending law school. Though she is far busier than most, her work was comparable or better than her classmates who are full-time students. This demonstrates Brittany's ability to manage her time and to do her work efficiently.

Brittany recently volunteered to work with Prosecutors' Center for Excellence (PCE) on a variety of projects. She takes minutes during our weekly calls with senior prosecutors from around the country who gather to discuss the challenging issues of the day. She is also conducting research for a paper on the various approaches to expungement and sealing. Over the course of the summer, she will be involved in additional research projects and will assist with PCE conferences.

Aside from her legal abilities, Brittany is a very up beat and friendly person. She sees the bright side of things, is cheerful and works collaboratively. She is a pleasure to work with.

I give Brittany my highest recommendation.

Please feel free to contact me, if you require additional information.

Sincerely,

Kristine Hamann
Executive Director
Prosecutors' Center for Excellence

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to give my strongest recommendation and support for Brittany Appleby-Rumon's application for a clerkship in your chambers.

This past semester Brittany was an absolutely superb student in my Advanced Evidence writing seminar. I was tremendously impressed by her writing and oral presentations, and by the extensive and thorough research and analysis she did that went into them. I am confident she would be an exceptional law clerk.

The seminar is purposely kept small—no more than 8-10 students—so that I get to know the students and their capabilities well and can give them extensive written and oral critiques of their work. Like ordinary classes, this writing seminar involved regular weekly two-hour class sessions with textbook reading assignments over one semester. But the main component here was a major semester-long writing assignment. Each student was charged with authoring and presenting (to me and the whole class both in writing and orally) multiple successive professor-supervised drafts of their original scholarly paper of 25 or more pages on a subject of their choice (approved by me) in the area of Advanced Evidence. Brittany's paper, making a creative well-reasoned proposal on spousal privilege, was extraordinarily well done.

Brittany was a strong writer and supportive colleague to her classmates. I ultimately recommended her paper for publication. She also helped strengthen fellow classmates' papers by providing excellent feedback to them, which the course was structured to encourage.
I got to closely observe and interact with Brittany while she wrote multiple drafts of her paper. From day one she was meticulous and thorough in her research. Although she picked a topic discussed by few scholars, she was undaunted by the challenge of being among the first to not only provide comprehensive analysis of the issue but also prescribe a workable solution.
Brittany is remarkably resourceful and unafraid to ask for feedback. In addition to reaching out to me and fellow classmates for advice, she engaged in discussions with U.S. Department of Justice prosecutors and law school friends going into public defense, in order to incorporate and address practical concerns and counterarguments in her paper, which could profoundly affect some criminal practice. Her receptiveness to criticism and ability to keep an open mind was evident in the improvements that each of her successive drafts incorporated.

Brittany's ability to self-edit, revise, and fortify weaknesses in her arguments not only improved her writing but her classmates' writing as well. Within forty-eight hours of a student submitting a draft Brittany would comb through it, provide line edits, and comment on areas of strength and room for improvement. Often Brittany would email her classmates law review articles, sociological studies, and cases she had come across in other courses that she thought could help the student's thesis.

She did all this in the nicest of ways, and her classmates enthusiastically welcomed her help and openly expressed genuine gratitude. She is very good at, as well as diplomatic in, collaborative work. Her helpful attention to classmates' papers showcased her insatiable interest in the subject matter, enjoyment of writing, and desire to see others succeed.

Brittany's excitement to learn and grow as a legal writer (though already an accomplished one) was abundantly evident in every class session. Rarely did I see her without a smile on her face and enthusiasm in her voice whenever she was presenting her paper or asking thoughtful questions to her colleagues and guest speakers. That Brittany wrote a publishable paper while she worked a full-time job, trained for her first marathon, and conducted pro bono research for another law professor's non-profit organization, is a testament to her unwavering self-motivation and work ethic. And she is such a nice person, to boot. I am certain she would bring this enthusiasm and grit to this clerkship and to the benefit of your chambers.

Please do not hesitate to contact me if you have any further questions about this.

Kindest regards,

Rothstein Paul - Paul.Rothstein@law.georgetown.edu - 202.662.9094

/s/
Paul Rothstein
Carmack Waterhouse Professor of Law

Rothstein Paul - Paul.Rothstein@law.georgetown.edu - 202.662.9094

U.S. Department of Justice

Narcotic and Dangerous Drug Section
Criminal Division

Katharine A. Wagner, Trial Attorney
145 N Street, Northeast
Second Floor, East Wing
Washington, DC 20530
Phone: (202) 514-4584

May 24, 2021

Re: Brittany Appleby-Rumon

Dear Judge:

Please accept this letter in strong support of Brittany Appleby-Rumon's application for a clerkship. I have had the pleasure of working with Brittany at NDDS since I joined the Section in November 2019, both as a paralegal working on investigations and cases and as the paralegal assigned to the intern program, which I coordinate. She has excelled in both capacities.

While working fulltime as a paralegal at NDDS, Brittany has also been attending Georgetown University Law Center as a parttime law student. She accomplished this feat so seamlessly that I did not know that she also was attending law school for several months. Her ability to balance a fulltime legal position in a fast-paced and often unpredictable setting with her legal studies has been impressive to witness.

As a paralegal assigned to investigations and cases, Brittany is organized, detail-oriented, and a quick learner. She also is responsible for drafting routine motions and proposed orders and preparing indictment complaint, and search warrant packages for submission to the court. Brittany was a fairly new paralegal when I began working with her, but learned the position quickly and with enthusiasm. She has assisted me in managing complex, large-volume financial investigations, including document management, discovery, and sealed filings with the Court. She also handles some of the most sensitive documents and information in our Section. I trust and rely on her and will miss her greatly when she leaves to pursue her own legal career.

As a paralegal and in managing the intern program, Brittany has had to interact routinely with human resources, our IT department, the Clerks Office in District Court and the D.C. Circuit, clerks, courtroom deputies, the U.S. Marshals, and other court personnel. She has navigated these relationships expertly, even through the challenges of Covid restrictions. Her familiarity with the court procedures (formal and informal) would be an asset to any chambers.

In addition to her skills and experience, Brittany has an innate collegiality. Within minutes of interacting with Brittany it becomes apparent that she is professional, respectful, sharp, inquisitive, enthusiastic, and a joy to work with. Her attitude is always positive, even in emergencies, and she is a consummate team player.

In short, Brittany is one of the best paralegals that I have had the honor of working with in nearly ten years with the Department of Justice. I recommend her without reservation for a clerkship position. Not only is she more than capable of excelling at the research and writing required of a clerk, but she has the organizational and professional experience and skills to quickly adapt to chambers and complex case management. If you have any questions, please feel free to contact me at (202) 262-9589 or by email at katharine.wagner@usdoj.gov.

Sincerely,

KATHARINE A. WAGNER
Trial Attorney

BRITTANY APPLEBY-RUMON

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Note on Writing Sample

The attached writing sample is a paper I wrote for my Advanced Evidence: Supreme Court and Constitution Seminar this Spring. In the paper I discuss the spilt among federal circuit courts to recognize a joint crimes exception to the spousal adverse testimonial privilege and ultimately advocate for adoption of the exception on a case-by-case basis. For brevity I omitted definitions and historical background of the spousal privileges, Part II which explores the evolving justifications of the testimonial privilege, additional arguments for and against recognizing the exception, and the conclusion. The work contained herein is my own. The extent that this work was edited by others is limited to feedback I received during in-class discussion.

Until Death or Subpoena Do Us Part: A Claim for Adopting the Joint Crimes Exception for the Spousal Adverse Testimonial Privilege

Pineda and Guerrero, husband and wife, were business partners who sold fentanyl and heroin.[1] The two participated in all aspects of the business, negotiating price, arranging meet ups with buyers, and attending transactions.[2] They were arrested together at the location of a planned drug sale.[3] Guerrero pled guilty while Pineda went to trial.[4] At Pineda's trial the government subpoenaed Guerrero to testify.[5] Guerrero, still being Pineda's wife, invoked the spousal testimonial privilege which gives a spouse the choice to testify or refrain from testifying against her spouse.[6] The district and appellate court granted the privilege and Guerrero was not compelled to testify.[7] Over two hundred years ago Jeremy Bentham commented, the testimonial privilege permits a person to convert his house into a "den of thieves" and "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime."[8] The next two hundred years should not be the same. Courts must trade the axe for the scalpel and only cut otherwise probative evidence, only grant the testimonial privilege, to preserve a relationship that can benefit the public. Blind application of the testimonial privilege may prevent divorce, but it also prevents justice. Fentanyl, a drug Pineda and Guerrero sold and supplied, attributes to over 80,000 deaths in a single year.[9]

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[1] United States v. Pineda-Mateo, 905 F.3d 13, 18 (1st Cir. 2018).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 19.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 19, 26.
[8] Jeremy Bentham, *5 Rationale of Judicial Evidence*, 340, 338 (1827).
[9] CTRS. FOR DISEASE CONTROL & PREVENTION, OVERDOSE DEATHS ACCELERATING DURING COVID-19 (2020), https://www.cdc.gov/media/releases/2020/p1218-overdose-deaths-covid-19.html ("Over 81,000 drug overdose deaths…in the United States in [2020]….[S]ynthetic opioids (primarily illicitly manufactured fentanyl) appear to be the primary driver of…overdose deaths.").

I. Federal Marital Privileges and the Joint Crimes Exception

Whether the joint crimes exception applies to the adverse testimonial privilege to compel spouses who are co-conspirators to testify as adverse witnesses against each other has not been explicitly declared by the Supreme Court.[10] The Supreme Court also has not explicitly declared a joint crimes exception to the confidential communications privilege, however, close to every federal appeals court recognizes the exception.[11] In contrast, a majority of federal circuit courts do not recognize a joint crimes exception to the adverse testimonial privilege.[12] In the minority view, the Seventh and Tenth Circuits recognize the exception to the privilege.[13]

This Comment examines legal precedent in federal courts to determine whether federal courts should uniformly recognize a joint crimes exception to the adverse testimonial privilege. [*Part II omitted*]. Part III summarizes the current state of the law of the adverse testimonial privilege and federal circuit court split in recognizing the joint crimes exception. Parts IV and V present the circuits' various reasons for and against recognizing the exception. Part VI concludes

[10] Circuit courts disagree whether the Supreme Court in *Trammel v. United States*, 445 U.S. 40, 53 (1980), implicitly held the adverse testimonial privilege is absolute, subject to no exception, in explicitly ruling a witness spouse cannot be compelled to testify adversely against his or her spouse. *See* United States. v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), *overruled on other grounds by* United States v. Nordy, 225 F.3d 1053 (9th Cir. 2000) (finding Court's ruling in *Trammel* does not permit compulsion of an "unwilling spouse" to testify despite joint criminal activity). *But see* United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983) (finding recognition of the joint crimes exception consistent with Supreme Court's trend toward restricting the privilege as it did in *Trammel* where the Court restricted the privilege's availability to the witness-spouse only).

[11] *See* United States v. Bey, 188 F.3d 1, 4-5 (1st Cir. 1999); United States v. Estes, 793 F.2d 465 (2nd Cir. 1986); United States v. Ammar, 714 F.2d 238 (3d Cir. 1983); United States v. Broome, 732 F.2d 363 (4th Cir. 1984); United States v. King, 541 F.3d 1143 (5th Cir. 2008); United States v. Sims, 755 F.2d 1239 (6th Cir. 1985); United States v. Kahn, 471 F.2d 191 (7th Cir. 1972); United States v. Evans, 966 F.2d 398 (8th Cir. 1992); United States v. Price, 577 F.2d 1356 (9th Cir. 1978); United States v. Neal, 743 F.2d 1141 (10th Cir. 1984).

[12] *See* United States v. Pineda-Mateo, 905 F.3d 13 (1st Cir. 2018); In re Grand Jury Subpoena U.S., 755 F.2d 1022 (2d Cir. 1985); Appeal of Malfitano, 633 F.2d 276 (3d Cir. 1980); United States. v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), *overruled on other grounds by* United States v. Nordy, 225 F.3d 1053 (9th Cir. 2000).

[13] *See* United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir. 1974); *see also* United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978).

the overriding justification for the adverse testimonial privilege, to protect the marriage, does not automatically outweigh the importance of evidence precluded from investigation when spouses are jointly involved in the prosecuted criminal activity. Instead, courts should evaluate whether the joint crimes exception should apply on a case-by-case basis using a multi-factor balancing test that fairly weighs the competing interests of preserving marital harmony for the public's benefit and accessing probative evidence necessary to prosecute crimes against the public welfare.

III. Current State of the Law: Adverse Testimonial Privilege and the Joint Crimes Exception

a. Supreme Court Jurisprudence

The Supreme Court regards the adverse testimonial privilege as indispensable but, not impenetrable, leaving room to debate whether a joint crimes exception should exist to deny a witness-spouse the privilege's protection where both spouses engaged in the alleged crime. In the two most recent seminal Supreme Court cases discussing the spousal adverse testimonial privilege, *Hawkins v. United States* and *Trammel v. United States*, the Court caveats its stance on the broad reach of the privilege, noting if exclusion of privileged testimony leads to injustice, "Congress or this Court, by decision or [rule] can change or modify the rule where circumstances or further experience dictates."[14] [*Hawkins and Trammel discussion omitted for brevity*]

b. Federal Circuit Courts' Interpretations Regarding the Joint Crimes Exception

Without an explicit statement from the Supreme Court on the joint crimes exception to the adverse testimonial privilege, the federal circuit courts have split. In the minority, the Seventh and Tenth Circuits recognize the exception while in the majority, four circuits refuse to acknowledge it.[15] Circuits that reject the exception interpret *Hawkins*' and *Trammel*'s rulings to endorse an

[14] *Hawkins*, 358 U.S. 74, 78 (1958). *See also Trammel*, 445 U.S. at 46.
[15] *See* United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir. 1974); *see also Trammel*, 583 F.2d 1166. *But see* United States v. Pineda-Mateo, 905 F.3d 13 (1st Cir. 2018); In re Grand Jury Subpoena U.S., 755

absolute privilege, an unwilling spouse can never be compelled to testify.[16] Circuits that recognize the exception treat *Hawkins* and *Trammel* as a Supreme Court directive to construe the privilege narrowly to promote prosecutors' robust investigation of the crime.[17]

IIII. ARGUMENTS FOR ACCEPTING A JOINT CRIMES EXCEPTION

The Seventh and Tenth Circuits recognize a joint crimes exception to the adverse testimonial privilege, finding the need for the privilege, to preserve a family or marriage, outweighed by the risk of an absolute privilege that "assur[es] a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness."[18] While the two circuits share this common belief in endorsement of the exception, the circuits offer varying underlying support for the proposition. The Tenth Circuit in *United States v. Trammel*, the appellate decision in the earlier discussed Supreme Court case *Trammel v. United States*, concludes an exception is proper because spouses' joint criminal activity extinguishes any marital or familial harmony the testimonial privilege is designed to protect, making the privilege a safe harbor for criminals and their accomplices without securing any benefit to the public.[19] The Seventh Circuit in *United States v. Van Drunen* recognizes a joint crimes exception for two additional reasons: (1) the rationale behind

F.2d 1022 (2d Cir. 1985); Appeal of Malfitano, 633 F.2d 276 (3d Cir. 1980); United States. v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), *overruled on other grounds by* United States v. Nordy, 225 F.3d 1053 (9th Cir. 2000).

[16] *See Ramos-Oseguera*, 120 F.3d 1028, *overruled on other grounds by* United States v. Nordy, 225 F.3d 1053 (9th Cir. 2000) (reasoning *Trammel* does not permit compulsion of an "unwilling spouse" to testify despite joint criminal activity).

[17] *See* United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983) (finding *Trammel*'s reasoning to restrict the privilege's availability to the witness-spouse also supports recognition of the joint crimes exception); *see also Van Drunen*, 501 F.2d at 1396 (concluding *Hawkins*'s "sub silentio" holding "that the privilege against spousal testimony applies" in cases "involving joint criminal venture" is not "controlling" and "not of the same precedential value as would be an opinion of this Court treating the question on the merits").

[18] *Van Drunen*, 501 F.2d at 1396; *Trammel*, 583 F.2d at 1169-70.

[19] *See Trammel*, 583 F.2d at 1169-71.

federal appeals courts' broad acceptance of a joint crimes exception to the marital communications privilege also supports recognizing the exception to the testimonial privilege and (2) the Supreme Court's recognition of an injured spouse exception to the testimonial privilege in *Wyatt v. United States* demonstrates the privilege is not immune to other exceptions like joint crimes.[20]

a. Spouses' Joint-Crime Destroys Any Marital Harmony the Adverse Testimonial Privilege Could Preserve

The Tenth Circuit in *United States v. Trammel*, the appellate decision the Supreme Court affirmed in *Trammel v. United States*, contended that when spouses jointly pursue crime the proper functioning of the adverse testimonial privilege, to preserve "family peace," is disabled because criminal activities, like the illicit import of heroin in *Trammel*, lead to the irreparable "breakdown and destruction of…family units and marital relations."[21] In other words, spouses' criminal activities extinguish any existence or possibility of "domestic harmony" or "family peace" that the privilege could protect or adverse spousal testimony could destroy.[22] Where there is a "husband-wife conspiracy transactio[n]" or spousal joint venture, "the overriding benefit [is] bringing to the bar of justice" the culprits of the crime through applying the joint crimes exception.[23] The Tenth Circuit, applying the exception, affirmed the defendant's conviction where the district court allowed the witness-spouse to testify against the defendant-spouse, over the defendant's objection, where both spouses jointly participated in the importation of heroin.[24]

Three circuits strongly dispute the Tenth Circuit's contention that marriages where spouses are involved in criminal activity are devoid of marital or familial harmony, and more broadly

[20] *See Van Drunen*, 501 F.2d at 1396; *see also* United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972); *see also* Wyatt v. United States, 362 U.S. 525 (1960).
[21] *See Trammel*, 583 F.2d at 1169-71.
[22] *See id.*
[23] *Id.* at 1171.
[24] *Id.* at 1170-71 (determining that witness-spouse was jointly involved in defendant-spouse's importation of heroin as she "followed instructions" to "accomplish the illicit goals of the scheme").

devoid of value to society. The Third Circuit in *Appeal of Malfitano* pushed back asserting marriages "with partners that engage in crime" have "social value."[25] Marriage can "tie…individuals into…social norms and behavioral patterns" that in turn "serve as a restraining influence on couples against future antisocial acts and may tend to help future integration of the spouses back into society."[26] The Second Circuit in *In re Grand Jury Subpoena* added additional support to this position stating it is "unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners…decided to engage in a criminal activity."[27] The First Circuit in *United States v. Pineda-Mateo* adopted and reiterated both points in its refusal to recognize a joint crimes exception.[28]

b. Exception to Testimonial Privilege would Unify the Law Governing Spousal Privileges as Exception Exists for Communications Privilege

Close to every federal court of appeals has adopted a joint crimes exception to the marital communications privilege.[29] The Seventh Circuit found in *United States v. Van Drunen* that considerations underlying its earlier decision to adopt a joint crimes exception for the confidential communications privilege supports recognizing this exception for the adverse testimonial privilege.[30] The Court reasoned, just like protecting "conversations in furtherance of [joint] crimes," protecting testimony describing actions taken in furtherance of joint crimes is unjustified by the "public interest in preserving the family," especially where doing so would "assur[e] a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that….he is

[25] *See* Appeal of Malfitano, 633 F.2d 276, 278 (3d Cir. 1980).
[26] *Id.*
[27] In re Grand Jury Subpoena *U.S.*, 755 F.2d 1022, 1026 (2nd Cir. 1985).
[28] *See* United States v. Pineda-Mateo, 905 F.3d 13, 23 (1st Cir. 2018).
[29] *See* cases cited *supra* note 11.
[30] *See* United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir. 1974); *see also* United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972).

creating another potential witness."[31] The Seventh Circuit, applying the exception, affirmed the defendant's conviction where the district court allowed the witness-spouse to testify against the defendant-spouse and the spouses had jointly participated in the illegal transportation of aliens.[32]

Almost fifty years later, the government raised this argument unsuccessfully in advocating for recognition of the joint crimes exception in the First Circuit in *United States v. Pineda-Mateo*.[33] The First Circuit rejected the argument that the exception could just as easily apply to the adverse testimonial privilege as it did to the marital communications privilege reasoning the two privileges are distinct for at least three reasons: (1) the communications privilege is designed to promote full communication while the testimonial privilege protects against compulsion;. (2) exception to the communications privilege leads to the availability of a "narrow universe of testimony" while an exception to the testimonial privilege makes available a broad "panoply" of information that's reveal "may be detrimental to a marriage"; and (3) exception to the communications privilege poses less potential harm to a marriage than an exception to the testimonial privilege because a latter exception would force the witness-spouse to "take the witness stand, face his or her spouse, and put the nails in the defendant spouse's proverbial coffin…undermin[ing] the marriage precisely in the manner…the privilege is designed to prevent."[34]

[31] *See Van Drunen*, 501 F.2d at 1396.
[32] *Van Drunen*, 501 F.2d at 1395-96 (concluding the witness-spouse was jointly involved in " Count I violation" as she was the Mexican-national smuggled into the United States).
[33] *Pineda-Mateo*, 905 F.3d at 25 (government arguing since both spousal privileges were created to promote "marital harmony "the outcome of the Rule 501 balance in the conspiracy context should be the same" for both privileges").
[34] *Id.*

IIV. ARGUMENTS FOR REJECTING A JOINT CRIMES EXCEPTION

In the majority, the First, Second, Third, and Ninth Circuit refuse to recognize a joint crimes exception to the adverse testimonial privilege. The Ninth Circuit in *United States v. Ramos-Oseguera* finds the Supreme Court's ruling in *Trammel* dispositive because *Trammel* prohibits a spouse's compelled testimony and an exception could allow the government to force an unwilling spouse to testify.[35] The First Circuit in *United States v. Pineda-Mateo* takes another route to reject the exception, undertaking a balancing test proscribed under Rule 501 of the Federal Rules of Evidence to weigh the need for the co-conspirator spouse's testimony with the policy concerns underlying the spousal privilege to conclude the latter interest outweighs the former.[36] The Second and Third Circuits in *In re Grand Jury Subpoena U.S.* and *Appeal of Malfitano* round out the case against the exception pointing to the administrative challenges courts would face in implementing an exception including, curbing prosecutorial abuse in overuse of the exception and assessing the "social worthiness" of individual marriages to determine whether the exception should attach.[37]

a. *Trammel*'s Prohibition on Compelled Testimony Precludes Exception

In *United States v. Ramos-Oseguera*, the Ninth Circuit rejected a joint crimes exception to the adverse testimonial privilege outright and reversed the witness-spouse's contempt citation for refusing to testify at the defendant-spouse's trial.[38] The Court acknowledged the Ninth Circuit recognizes a joint crimes exception to the confidential communications privilege. However, the

[35] *See* United States. v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), *overruled on other grounds by* United States v. Nordy, 225 F.3d 1053 (9th Cir. 2000).
[36] *Pineda-Mateo*, 905 F.3d at 21.
[37] *See* In re Grand Jury Subpoena U.S., 755 F.2d 1022, 1026 (2d Cir. 1985); *see also* Appeal of Malfitano, 633 F.2d 276, 279 (3d Cir. 1980).
[38] *See Ramos-Oseguera*, 120 F.3d 1028, *overruled on other grounds by* United States v. Nordy, 225 F.3d 1053 (9th Cir. 2000) (noting the district court found witness-spouse could not assert testimonial privilege to escape contempt charge because she was jointly involved in defendant's criminal activities having been previously convicted on related drug possession and distribution charges).

Court refused to extend application of the exception to the adverse testimonial privilege in light of the Supreme Court's ruling in *Trammel*.[39] The Court explained applying an exception to this case would compel an *unwilling* spouse to testify against her husband, contravening the Supreme Court's non-compulsion rule announced in *Trammel* which states a "witness may be neither compelled to testify nor foreclosed from testifying."[40] The Ninth Circuit concluded that forcing the unwilling spouse to choose "between testifying against her husband and facing contempt charges" was improper.[41]

Two circuits, the First and Second, while ultimately agree with the Ninth Circuit that a joint crimes exception should not be recognized, disagree that the Supreme Court in *Trammel* rejected the joint crimes exception.[42] The First Circuit points out in *Trammel* that the Supreme Court did not discuss the joint crimes exception, did not grant certiorari to affirm or reject the exception, and focused on re-examining *Hawkins*.[43] The First Circuit was unpersuaded that the Supreme Court would reject an exception "it did not so much as mention" and refused to find an implicit rejection of the exception from the Court's failure to "opine on [the exception]'s merits" as doing so would be a "wrong" and "[im]prudent reading of precedent."[44] In sum, the two circuits concluded the Supreme Court's "silence on th[e] issue is just that – silence."[45]

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[39] *See id*. ("[T]his circuit has held that "the marital communications privilege does not apply to communications having to do with present or future crimes in which both spouses are participants"…because of society's strong interest in the administration of justice.").
[40] *See id.*
[41] *See id.*
[42] *See* United States v. Pineda-Mateo, 905 F.3d 13, 19-21 (1st Cir. 2018); In re Grand Jury Subpoena U.S., 755 F.2d 1022, 1026 (2d Cir. 1985) (finding that while *Trammel* had "negative implications as regards the joint [crimes] exception" the Supreme Court did not "rejec[t] the…exception").
[43] *See Pineda-Mateo*, 905 F.3d at 19-21.
[44] *See id. at* 19-20.
[45] *Pineda-Mateo*, 905 F.3d at 20; *In re Grand Jury Subpoena U.S.*, 755 F.2d at 1026.

b. Societal Need for Marital Harmony Outweighs Probative Value of Lost Testimony

Under Rule 501 of the Federal Rules of Evidence courts are empowered to develop rules governing claims of privilege on a case-by-case basis in "light of reason and experience."[46] A court should only grant a claim of privilege where the privilege "promotes sufficiently important interests [that] outweigh the need for probative evidence."[47] The First Circuit in *United States v. Pineda-Mateo* undertook a Rule 501 balancing analysis and concluded the testimonial privilege should continue to attach where both spouses engaged in the charged criminal conduct because the "government's interest in compelling the testimony of a defendant's co-conspiring spouse is outweighed by the significant policy concerns underlying the spousal privilege."[48]

On the "need for probative evidence" side of the scale the government argued: (1) conspiracies, such as criminal schemes between spouses, heighten the need for evidence because a "collective criminal agreement presents a greater potential threat to the public" than crimes perpetrated by individuals and (2) prosecutors have a particularly strong need to obtain "testimony of a co-conspirator…to subvert the conspiracy" because the "inchoate and secretive nature of conspiracies" makes obtaining other evidence to prosecute unfeasible.[49] The Court rejected both arguments.[50] The Court acknowledged that spousal-conspiracies are more dangerous to the public than crimes perpetrated by individuals, but held they are no more dangerous than any other type of conspiracy.[51] If the Court were to recognize a joint crimes exception under the government's first argument it would make any evidentiary privilege vulnerable to exception where a conspiracy

[46] FED. R. EVID. 501; *see also Pineda-Mateo*, 905 F.3d at 21.
[47] *Pineda-Mateo*, 905 F.3d at 21.
[48] *Id.*
[49] *Id. at* 22.
[50] *Id. at* 22-23.
[51] *See id. at* 23.

was charged, such as the Fifth Amendment privilege against self-incrimination.[52] The Court was also unpersuaded by the argument that co-conspirator testimony is necessary to prosecute spousal conspiracies, finding many alternative "types of evidence…a court may consider to determine whether a couple was engaged in a criminal agreement."[53] However, the Court makes no effort to list what types of evidence it had in mind.

On the other side of the scale are "substantial" public policy interests the privilege is "designed to serve" the Court found of greater "heft" than the Government's "evidentiary interests" in support of an exception[54] The Court reiterated the policy interests mentioned earlier from the Second and Third Circuits: marriages with partners that engage in crime have "social value," "serve as a restraining influence on couples against future antisocial acts and … help… integrat[e]…spouses back into society," and have martial harmony for the privilege to preserve.[55] The government sharply disagreed with the Court arguing the privilege "wrongly places the law on the side of protecting conspiracies within a marriage."[56]

VI. Joint Crimes Exception to the Adverse Testimonial Privilege Should be Recognized and Applied on a Case-by-Case Basis

A joint crimes exception to the adverse testimonial privilege should be adopted in federal courts. Recognition of the exception is consistent with modern justification for the privilege and strikes the proper balance between preserving marital harmony with the legal system's imperative need to access probative evidence in the administration of justice. To override a witness-spouse's assertion of the adverse testimonial privilege with the joint crimes exception, the government must

[52] *See id.*
[53] *Id.*
[54] *See id.* at 22-23.
[55] *See* Appeal of Malfitano, 633 F.2d 276, 278 (3d Cir. 1980); *see also* In re Grand Jury Subpoena U.S., 755 F.2d 1022, 1026 (2d Cir. 1985).
[56] *Pineda-Mateo*, 905 F.3d at 22.

file with the court a motion in limine that demonstrates the probative value of the witness-spouse's anticipated testimonial evidence sufficiently outweighs the policy concerns of the spousal privilege based on the following factors:

(a) witness-spouse's role in the joint criminal activity;

(b) severity of the alleged offense;

(c) bona fides of the marriage and;

(d) necessity of the testimony.

After collecting parties' submissions on the exception's applicability to the witness-spouse's anticipated testimony, including any opposition response from defense counsel or witness-spouse's counsel, the Court will evaluate and rule whether the exception applies to compel the witness-spouse to testify.

a. Supreme Court Rulings Do Not Foreclose Adoption of a Joint Crimes Exception

Circuits for and against accepting a joint crimes exception agree the Supreme Court has not explicitly rejected the exception.[57] The Supreme Court's discussions in *Hawkins* and *Trammel* may offer implicit support for the exception's recognition. The Court's willingness to recognize an exception to the adverse testimonial privilege is demonstrated by other exceptions the Court already approved like in *Wyatt*, a post-*Hawkins* decision, where the Court carved out an injured spouse exception, to prevent spouses from asserting the adverse testimonial privilege where the spouse commits a crime against the other.[58] In *Hawkins* and *Trammel* the Court had an opportunity

[57] *Pineda-Mateo*, 905 F.3d at 19-21; *In re Grand Jury Subpoena U.S.*, 755 F.2d at 1026 (refusing to recognize the joint crimes exception, however, acknowledging the Supreme Court in *Trammel* did not explicitly "rejec[t] the…exception"); *see also* United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir. 1974) (recognizing the exception stating *Hawkins*'s "sub silentio" holding "that the privilege against spousal testimony applies" in cases "involving joint criminal venture" is not "controlling").
[58] *See* Wyatt v. United States, 362 U.S. 528 (1960).

to explicitly reject the joint crimes exception to the privilege since in the two cases both spouses were allegedly involved in the underlying offense, but the Court did not.[59]

In *Trammel*, the Supreme Court's implicit support of a joint crimes exception is even more evident in the Court's affirmance of the Tenth Circuit's decision to deny the petitioner's claim to the privilege, without remand for reconsideration on any issue, where the Tenth Circuit refused to grant the privilege after extensively discussing the nature of the crime, that both spouses were involved, and adopting the joint crimes exception.[60] On a broader note, review and comparison of the Supreme Court's rulings on the adverse testimonial privilege collectively illustrate a continuing trend for the Court to restrict the privilege "to those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the spouse's crime," a trend that supports inevitable adoption of the joint crimes exception.[61]

b. Balancing Test is Consistent with Courts' Duties Governing Privilege Claims and is Feasible to Administer

Courts should only grant a claim of privilege where the privilege "promotes sufficiently important interests [that] outweigh the need for probative evidence."[62] Courts that blindly approve claims of privilege, such as the spousal adverse testimonial privilege, fall short of its duties to govern claims in "light of reason and experience" as the Federal Rules of Evidence mandate.[63] A

[59] *See* Trammel v. United States, 445 U.S. 40, 42 (1980) (naming the husband as a defendant and the wife as an unindicted co-conspirator in an indictment for importing heroin into the United States)*;* Hawkins v. United States, 358 U.S.74, 77-78 (1958); *see also Van Drunen*, 501 F.2d at 1396 (pointing out in *Hawkins* the "Court of Appeals' opinion reveals…defendant…transported a woman from…Oklahoma, to Mena, Arkansas...where the woman worked as a prostitute with defendant's wife. It is fairly clear that both spouses were engaged in a conspirac[y]").

[60] *See Trammel*, 445 U.S. at 53; *see also Trammel*, 583 F.2d at 1170-71 (holding "husband-wife conspiracy transactions" are a necessary exception to the adverse testimonial privilege "in order to effect the beneficent purposes of the rule").

[61] *Van Drunen*, 501 F.2d at 1397; *see also Trammel*, 445 U.S. at 42 (restricting privilege's availability to the witness-spouse only); *Wyatt*, 362 U.S. 528 (restricting the privilege to exclude protection in cases where one spouse commits a crime against the others).

[62] United States v. Pineda-Mateo, 905 F.3d 13, 21 (1st Cir. 2018).

[63] *See* FED. R. EVID. 501.

balancing of the competing interests between the need for probative evidence and promotion of important public policy goals underlying a privilege, like the balancing done by the First Circuit in *United States v. Pineda-Mateo*, when modified to apply to a case's specific facts, would fulfill courts' duties.[64] This type of balancing analysis in cases where both spouses engaged in the alleged criminal activity would also ensure the testimonial privilege operates to serve its proper purpose to preserve "ongoing and viable marriages," not provide safe harbor for criminals and their accomplices as a result of a court's attempt to salvage an often irreparable relationship.[65] A balancing test to resolve whether the probative value of the witness-spouse's anticipated testimonial evidence sufficiently outweighs the policy concerns of the spousal privilege offers a workable solution to the concern that courts' are unable to judge the "social worthiness" of marital relationships in that the factors the court considers to make its conclusion are already routinely evaluated by judges.[66]

The first two factors, a witness-spouse's role in the joint criminal activity and the severity of the alleged offense, are included to prevent destruction of a harmonious marriage where the spouse's role in the "joint offense" was minor and permit careful scrutiny of privilege claims where the joint offense involved vulnerable victims, violence, or severe harm to others. Judges evaluate these factors in federal criminal trials routinely at sentencing hearings in determining the defendant's sentencing range, considering the defendant's role and the severity of the offense including whether the offense involved "use of a minor," "vulnerable victims," or created "substantial financial hardship."[67]

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[64] *Pineda-Mateo*, 905 F.3d at 21.
[65] *See* Katherine O. Eldred, *Every Spouse's Evidence: Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials*, 69 U. CHI. L. REV. 1319, 1335 (2002).
[66] *See* Appeal of Malfitano, 633 F.2d 276, 279 (3d Cir. 1980).
[67] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1-3B1.5 (U.S. SENTENCING COMM'N 2018). (advising courts where a "defendant was an organizer, leader, manager, or supervisor in any criminal

Courts should consider a third factor, bona fides of the marriage, to ensure a court is not attaching the privilege's protections to marriages solely entered into to shield the spouses from criminal liability that would otherwise arise if either spouse were to testify against the other in court. Courts are capable and experienced in evaluating the bona fides of a marriage. Immigration courts routinely make this evaluation to determine whether a foreign national entered into a marriage with their U.S. citizen spouse to reap the benefits of a green card. While this Comment does not propose courts adopt an immigration *Stokes*-like interview proceeding when making its determination on the privilege, immigration courts' process for evaluating potentially fraudulent marriages may help inform or guide a judge's analysis.

The last prong of the balancing test, the necessity of the testimony is critical in avoiding prosecutorial abuse of the joint crimes exception. This factor requires a strong prosecutorial showing of need for the evidence and the absence of alternative means to prove the crime before a court should make the decision to strain a marriage through compelled testimony. Courts often undertake this evaluation in civil discovery proceedings where a party seeks to view documents the opposing counsel marked work product, arguing "substantial need for the materials."[68] Lastly, since the prosecutor objects to the claim of privilege through filing a motion in limine, outside the presence of the jury, in cases where the balance of factors leans in favor of preserving the marriage, strain on the marriage and spouses will be minimized compared to debating the issue before the jury while the unwilling witness is brought on the stand.

activity…increase by 2 levels" and to otherwise adjust a defendant's offense range, usually to enhance a sentence, where any number of characteristics specific to the crime are present).

[68] *See* FED. R. CIV. P. 26(b)(3)(A)(ii) ("[A] party may…discover documents…prepared in anticipation of litigation…by or for another party…if the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.").

Applicant Details

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Applicant Education

BA/BS From	**Queen's University, Canada**
Date of BA/BS	**November 2017**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 21, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Texas Journal of Civil Rights and Civil Liberties** **American Journal of Criminal Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**University of Texas Board of Advocates**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

References

Travis Maples
Relationship: Clerk for Judge Debra Lehrmann, was my primary supervisor when I worked in her chambers
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

MAAZ ASIF

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Dual Citizen of the United States and Canada

Dear Judge Elizabeth W. Hanes,

I am a soon to graduate 3L at the University of Texas School of Law, interested in working as a judicial law clerk in your chambers. What drew me to this position is my desire to permanently relocate to the United States and my strong interest in judicial practice and legal theory.

My background and interests are well suited to this role. As a legal intern for Judge Lehrmann of the Texas Supreme Court I engaged in substantial appellate analysis. I analyzed cases and wrote memos on which would be appropriate for further judicial review looking for issues such as circuit splits, legal ambiguity and inconsistency between the various Courts of Appeals and the Supreme Court.

My first ever legal job was as a judicial intern for Justice Aurora Martinez Jones of the Travis County Courts. In this role I drafted sua sponte orders, assisted with dockets and wrote various research papers on topics such as technological advancements in the courtroom and ethics in judicial decision-making.

Currently I am a legal intern for De Mott, McChesney, Curtright, & Armendáriz. In this role I interact with lawyers, judges and clients. I am strengthening my interpersonal skills and professionalism as well as my transactional research and writing capabilities. I prepare arguments to be litigated in front of both courts and administrative agencies.

I have experience working in a corporate capacity as a Supply Chain Analyst at Apotex, the largest pharmaceutical company in Canada. Here I grew proficient at balancing multiple deliverables, developed the stamina needed to get through late hours and served many stakeholders of different cultural backgrounds and functional specialties.

Currently, I am a member of the University of Texas Board of Advocates under which I participate in moot court competitions. This experience has developed and strengthened my litigation skills as it has offered the opportunity to present arguments in front of actual district judges. I have found myself increasingly comfortable articulating matters in the courtroom, adhering to proper legal procedure, and speaking publicly on important matters.

Additionally, I have further strengthened my legal research and writing skills as I rose through the ranks as a staff, associate and now articles editor for the TEXAS JOURNAL OF CIVIL LIBERTIES AND CIVIL RIGHTS. Covid-19 has had an immense impact on the journal, and I have done much to help it navigate such challenges.

I am enclosing my resume, writing sample, transcript and references for your review. I look forward to further correspondence. Thank you for your time and consideration.

Sincerely,

Maaz Asif

MAAZ ASIF

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EDUCATION

The University of Texas School of Law, Austin, TX
Juris Doctor expected May 2022, GPA: 3.29
Journals: TEXAS JOURNAL OF CIVIL LIBERTIES AND CIVIL RIGHTS – Staff Editor, Associate Editor, Articles Editor, Technical Editor; AMERICAN JOURNAL OF CRIMINAL LAW – Associate Editor
Activities: 1L Mentor - Asian Pacific American Law Students Association; First Generation Law Students; Moot Court; Student Business Analyst – Texas Venture Labs; Student Attorney – Actual Innocence Clinic, SDM Lockhart Clinic

Smith School of Business, Queen's University, Kingston, ON
Bachelor of Commerce received November 2017, GPA: 3.34

EXPERIENCE

De Mott, McChesney, Curtright & Armendáriz LLP, San Antonio, TX
Legal Clerk, April 2021 - Present
Researching and writing transactional briefs/memos on issues such as foreign domestic business owners rights, and immigration estoppel to assist with litigation. Exposed to administrative, appellate, contract, corporate and criminal law.

Supreme Court of Texas, Austin, TX
Judicial Intern for the Honorable Debra Ann H. Lehrmann, January 2022 – April 2022
Drafting opinions, summarizing dockets, preparing legal memos and transactionally researching cases for judicial review.

Lower Colorado River Authority, Austin, TX
Law Clerk, August 2021 – December 2021
Transactionally assessed jurisdictional and administrative issues to see if proposed regulations fell within LCRA authority.

Austin Area Urban League, Austin, TX
Legal Assistant, June 2021 – August 2021
Transactionally researched sovereign immunity for litigation against ERCOT pertaining to the 2021 Texas power collapse.

Travis County Attorney's Office, Austin, TX
Legal Clerk, May 2021 – August 2021
Analyzed evidence to assess conviction probabilities, negotiated with attorneys and prepared arguments for litigation.

Travis County Courts, Austin, TX
Judicial Intern for the Honorable Aurora Martinez Jones, May 2020 – August 2020
Wrote *sua sponte* orders to combat noncompliance. Researched and wrote memoranda on topics such as racial issues in the court, ethical considerations in judicial decision-making and technological changes in the courtroom among others.

Hays County District Attorney's Office, San Marcos, TX
Law Clerk, May 2020 – August 2020
Analyzed homicide litigation evidence. Transactionally researched and wrote memos on digital evidence admissibility, First Amendment courthouse applicability, juvenile arrest/questioning standards and other issues to assist litigation.

Apotex, Toronto, ON
Supply Chain Analyst, September 2018 – August 2019
Facilitated transition to a new database structure, enhancing organizational efficiency, utilized SAP and Microsoft Excel.

LANGUAGES, SKILLS, PUBLICATION, INTERESTS

Languages: French, Urdu; ***Technical Skills*****:** CSS, Java, JavaScript, HTML5, Microsoft Office Suite, Python, R, SAP, SQL
Publication: "A framework for comparing early warning systems across domains: A step toward a data integrated public health EWS"; Presented at the Proceedings of the 3rd International Workshop on Issues and Challenges in Social Computing (WICSOC 2014), San Francisco, CA, August 13, 2014
Interests: Breaking Bad, Soccer, Rugby, Toronto Sports, Travel (Japan, Korea, UAE), Weightlifting, Writing, Video Games

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

JD

OFFICIAL NAME: ASIF, MAAZ
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ADMIT: 08-28-2019

TOTAL HOURS CREDIT: 77.00
CUMULATIVE GPA: 3.29

FAL 2019	433	CIVIL PROCEDURE		4.0	B	RGB
	523	CRIMINAL LAW I		5.0	B	DPJ
	332R	LEGAL ANALYSIS AND COMM		3.0	B-	WCS
	427	TORTS		4.0	B+	WEW
SPR 2020	421	CONTRACTS	P/F	4.0	CR	AKU
	431	PROPERTY	P/F	4.0	CR	LAB
	232S	PERSUASIVE WRTG AND ADV	P/F	2.0	CR	KSB
	434	CONSTITUTIONAL LAW I	P/F	4.0	CR	R A
	179P	STOICISM FOR LAWYERS	P/F	1.0	CR	WF
SUM 2020	F383	EVIDENCE-WB		3.0	B+	SJG
	S397P	INTERNSHIP: JUDICIAL-WB	P/F	3.0	CR	MRC
FAL 2020	381C	CONST LAW II: AMND US/W		3.0	B	R A
	397S	SMNR: PATENT LAW, ADVAN		3.0	A	DGW
	269	INSURANCE-WB		2.0	A-	RA
	385	PROFESSIONAL RESPONSIBI	P/F	3.0	CR	LDW
	377	ADMIRALTY LAW-WB		3.0	B	MFS
	346K	NEGOTIATION-WB		3.0	A-	ADJ
SPR 2021	379M	LAW/FIN/SCI: GLBL ENERG		3.0	A-	OLA
	697C	CLINIC: ACTUAL INNOCENC	P/F	6.0	CR	CP
	461	ADMINISTRATIVE LAW-WB		4.0	B	DEA
FAL 2021	384G	CORPORATE GOVERNANCE		3.0	A	WHC
	396W	TEXAS VENTURE LABS PRAC		3.0	A	MEP
	492C	BUSINESS ASSOCIATIONS		4.0	B-	DSS

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2019	16.00	16.00	16.00	3.02
SPR 2020	31.00	31.00	16.00	0.00
SUM 2020	37.00	37.00	19.00	3.30
FAL 2020	54.00	54.00	33.00	3.46
SPR 2021	67.00	67.00	40.00	3.30
FAL 2021	77.00	77.00	50.00	3.48

+ All Law School courses were graded on the pass/fail basis in Spring 2020 due to the COVID-19 public health crisis.

01-11-2022

Storm Uri Litigation Brief

What are the governmental responsibilities in response to a disaster such as Storm Uri?

Federal

General Responsibilities

The most relevant federal agency and therefore the most likely target for litigation is FEMA. According to its internal documentation, the federal government has three key obligations when a state asks for federal relief.[1] The first of which is to perform an initial assessment of damages alongside state and local governments. In doing so it must determine the damages undertaken by individuals, farms, business, public agencies, special districts, non-profit organizations and identify actions that can be implemented during and after repairs to mitigate the costs of another disaster.[2]

The second responsibility of the federal government is to screen applications for federal aid and approve or deny them. This will entail assigning a Federal Coordinating Officer to lead the Emergency Response Team, establishing a Disaster Field Office for the purposes of response and recovery coordination and working with the State Coordinating Officer for every request that is approved.[3] The third and final task is to activate the federal response plan which includes the establishment of an Emergency Support Team and the identification of the Emergency Support Functions this team must perform.[4]

Vulnerable Populations

FEMA's internal documentation also demonstrates a self-imposed heightened degree of responsibility for vulnerable populations.[5] These include people living in poverty, the elderly, rural communities and racial minorities such as African Americans and Latino Americans.[6] There is substantial precedence for courts requiring agencies to abide by their internal regulations[7], therefore any failure by FEMA to support uniquely susceptible populations would be subject to heightened scrutiny.

The rare occasion where federal agencies have been allowed to deviate from internal policy happens when the purpose of the policy is to govern the agency rather than protect the public interest, or when deviating from policy serves the public interest.[8] Neither of which is the case here.

State/County/Municipal

General Responsibilities

The Texas Disaster Act outlines various requirements for the state government and local governmental units such as counties and municipalities to meet. Relevant provisions include minimum standards for the training of government employees in emergency management[9], a requirement for there to be a disaster management plan[10], requirements for collaboration and cooperation between various levels of government[11], providing rapid and effective communication both internally and with the public[12], monitoring weather conditions that could result in a disaster[13], insulating critical infrastructure such as hospitals so that they can continue to operate[14] and maintaining a disaster contingency fund.[15]

Counties and municipalities also need to maintain emergency management programs that can effectively meet local needs.[16]

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[1] FEMA, *Overview of Local State and Federal Response to a Disaster*, (Accessed Jul. 9, 2021), Retrieved from: https://training.fema.gov/emiweb/downloads/is208sdmunit3.pdf
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Debra Ballen, *The Institute for Business & Home Safety Vulnerable Populations*, FEMA (Mar. 2009), Retrieved from: https://training.fema.gov/hiedu/docs/ballen%20-%20vulnerable%20populations.pdf; FEMA, *A Whole Community Approach to Emergency Management: Principles, Themes and Pathways for Actions*, (Dec. 2011), Retrieved from: https://www.fema.gov/sites/default/files/2020-07/whole_community_dec2011__2.pdf
[6] *Id.*
[7] *SERVICE v. DULLES*, 354 U.S. 363, (1957), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=c7b29b38-5f0a-4481-8817-d25e8931ca12&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-J640-003B-S29P-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=9e381c65-b2e8-4409-8ac0-8741bfdbe242
[8] *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 545 (1970), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=3bc7627e-18d8-47e5-9310-24e856338c3c&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-F200-003B-S2SY-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=f595e0aa-af33-4364-ab4e-ecc23fb21a82
[9] Tex. Gov't Code § 418.056, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[10] *Id.* § 418.042, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[11] *Id.* § 418.044, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[12] *Id.* § 418.047, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[13] *Id.* § 418.048, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[14] *Id.* § 418.055, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[15] Id. § 418.073, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[16] Id. § 418.102; § 418.103; § 418.106; Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm

Vulnerable Populations

The Texas Disaster Act places additional requirements on the State and all government units therein (including counties and municipalities) to have plans in place to protect "speciality care populations" in the event of a disaster such as Storm Uri.[17] It mandates the preparation of shelters for such individuals but does not suggest the responsibilities end there.[18]

While the statute is ambiguous in terms of what constitutes "specialty care populations" internal state government documentation suggests that it "may include, but are not limited to, individuals with disabilities, seniors, and populations having limited English proficiency, limited access to transportation, and/or limited access to financial resources to prepare for, respond to and recover from an emergency."[19]

Were those responsibilities met?

Federal

There is a long history of FEMA failing to abide by its internal regulations that require it to provide adequate relief to vulnerable communities.[20] The agency's own internal reports indicate a significant disparity between rich and poor, with the former far more likely to receive aid.[21] It is supposed to serve lower income individuals to a greater extent, but rather does so for higher income individuals instead. Documentation requirements for aid applications are difficult to meet for vulnerable communities and the lack of diversity in FEMA's workforce has been cited as an additional factor.[22]

In the case of the Texas energy grid collapse a spokesperson for FEMA has stated the agency has provided generators, waters, diesel and blankets.[23] Yet FEMA's response has been criticized for being insufficient. A significant delay in distributing aid was observed on the part of the federal government, forcing local organizations to bridge the gap.[24]

The disparity in receiving federal aid has been continued, with vulnerable communities receiving less aid than their wealthier counterparts.[25] Black communities in particular are reporting receiving insufficient funding.[26] This is similar to FEMA's failure in helping disadvantaged communities after Hurricane Harvey.[27] For instance the entirely white Taylor's Landing received an average of $60,000 per person from FEMA. Port Arthur, a community with a lower average income and a third of its residents being African American received only $84 per person.[28] Overall, there is a clear pattern of FEMA failing to abide by its internally outlined responsibilities to provide better relief for vulnerable communities, instead doing the very opposite.

State/County/Municipalities

The state clearly failed in its responsibilities to provide a heightened level of care for vulnerable populations. There have been various reports that the power grid collapse disproportionately affected minority and lower income communities. For example, areas of Texas that were able to maintain power were disproportionately wealthy.[29] There were observed failures at the municipal and county levels to distributing federal and state aid to lower-income and minority communities.[30] More assistance from state actors was provided to wealthier communities for applying for federal relief.[31] Even when the power came back there was no subsidization for energy bills for minority communities, despite such communities already spending more on energy.[32]

The Living Hope Wheelchair Association, reported that there was insufficient treatment for people with physical disabilities and the elderly.[33] It observed a lack of preparation as there were no backup power for people who needed electricity to power key medical devices such as oxygen machines.[34] Shelters were poorly equipped, lacking various live-

[17] Tex. Gov't Code § 418.056, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm
[18] *Id.*
[19] State of Texas, *Specialty Care Populations*, (Jul. 2020), Retrieved from: https://tdem.texas.gov/wp-content/uploads/2019/08/Specialty-Populations-Report-Final.pdf
[20] Rebecca Hersher, *Why FEMA Aid Is Unavailable to Many Who Need It The Most*, NPR, (Jun. 29, 2020), Retrieved from: https://www.npr.org/2021/06/29/1004347023/why-fema-aid-is-unavailable-to-many-who-need-it-the-most
[21] *Id.*
[22] *Id.*
[23] Benjamin Wermund, *FEMA sending generators, water and blankets to Texas*, Houston Chronicle, (Feb. 17. 2021), Retrieved from: https://www.houstonchronicle.com/politics/texas/article/FEMA-sending-generators-water-blankets-to-Texas-15957563.php
[24] Amy McCarthy, *When Government Could Not, Mutual Aid Kept Texans' Needs Met Through Winter Storm Uri*, Eater Houston, (Feb. 22, 2021), Retrieved from: https://houston.eater.com/22293485/mutual-aid-groups-disaster-relief-texas-winter-storm-uri
[25] Jamil Donith, *Unfair Distribution Causes Failure in Disaster Relief to Vulnerable Populations*, (Apr. 06, 2021), Retrieved from: https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/05/unfair-distribution-causes-failure-in-disaster-relief-to-vulnerable-populations-
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Silvia Foster-Frau & Arelia R. Hernández, *Freezing temperatures and power outages hurt Texas's most vulnerable yet again*, The Washington Post, (Feb. 16, 2021), Retrieved from: https://www.washingtonpost.com/national/texas-storm-hurts-most-vulnerable-again/2021/02/16/fe3c8fd4-707b-11eb-93be-c10813e358a2_story.html
[30] N'dea Yancy-Bragg & Rick Jervis, *Texas' winter storm could make life worse for Black and Latino families hit hard by power outages*, (Feb. 20, 2021), Retrieved from: https://www.usatoday.com/story/news/nation/2021/02/20/texas-ice-storm-blackouts-minorities-hardest-hit-recovery/4507638001/
[31] *Id.*
[32] *Id.*
[33] Living Hope Wheelchair Association, *Historic Freeze In Texas Is Especially Dangerous To Vulnerable Populations / Helada Histórica Es Especialmente Peligrosa Para Poblaciones Vulnerables*, (Feb. 17, 2021), Retrieved from: https://www.usworker.coop/blog/historic-freeze-in-texas-is-especially-dangerous-to-vulnerable-populations-helada-historica-es-especialmente-peligrosa-para-poblaciones-vulnerables/
[34] *Id.*

saving medical treatments such as dialysis.[35] There was a lack of coordination between various state agencies, counties and municipalities in providing relief for the physically disabled and non-English speakers.[36]

The poor response by the government indicates that the various provisions of the Texas Emergency Act mandating proper preparation for calamities such as Storm Uri at the state, county and municipal level were not met. There ought to have better training and preparation at each level.

Is there sovereign immunity?

Federal

FEMA is indisputably a government agency, thus any argument for it not to have sovereign immunity based on not being one would not succeed. A case was recently field by Texas RioGrande Legal Aid requesting FEMA disclose its internal procedures for deciding when to grant and when to deny aid under the Freedom of Information Act (FOIA).[37] At this point it is unclear how the organization intends to circumvent sovereign immunity, but it would be well worth paying attention to and possibly assisting with that lawsuit.

As a general rule, sovereign immunity is waived by the Administrative Procedures Act (APA) when a person suffers a legal wrong because of agency action, provided that another statute does not apply.[38] In addition, judicial review of a federal agency can only occur when "there is no other adequate remedy in a court."[39] Thus, there are four things that need to be proven: that a legal wrong was endured, that agency action caused the legal wrong, that no other statute overrules the APA and that there is no other adequate remedy.

Legal Wrong

The Supreme Court has held that a legal wrong must be defined in the context of the relevant statute[40], in this case the Stafford Disaster Relief and Emergency Assistance Act (SDREAA). It does not define "legal wrong" nor provide any guidance as to what that would constitute. Thus, deferral to common law is appropriate.

The Fifth Circuit defines a "legal wrong" as actions that result in "harm for which courts will impose civil liability."[41] Courts have civil liability for misallocation of funding of other federal agencies as the IRS[42] and significant harm was suffered by Texans due to not receiving sufficient federal support.[43]

Agency Action Caused Legal Wrong

As for the second component, the Supreme Court has upheld an exemption for liability for any federal government action done because a statute or internal regulation requires them to perform that action.[44] If a government actor does not perform their duty as required by the statute, then the government is liable.[45]

FEMA workers have many applicable responsibilities such as a requirement to report waste, fraud, abuse and corruption.[46] If any harm was incurred by victims of the Texas power grid collapse due to a failure of any FEMA worker to perform their statutorily obliged responsibilities, then litigation on the matter would not be barred by sovereign immunity.[47]

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[35] *Id.*
[36] *Id.*
[37] Robert Elder & Dani Marrero, *Rio Grande Valley Residents Sue FEMA Over Secret Rules for Disaster Assistance*, Texas RioGrande Legal Aid, (Jul. 15, 2021), Retrieved from: https://www.trla.org/press-releases-1/rio-grande-valley-residents-sue-fema-over-secret-rules-for-disaster-assistance
[38] 5 U.S.C. § 702, Retrieved from: https://www.law.cornell.edu/uscode/text/5/702
[39] 5 U.S.C. § 704, Retrieved from: https://www.law.cornell.edu/uscode/text/5/704
[40] *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990), Retrieved from: https://plus.lexis.com/search/?pdmfid=1530671&crid=be22941d-9cb6-4895-838e-9977585b9acf&pdsearchterms=lujan+v.+nat%27l+wildlife+fed%27n%2C+497+u.s.+871&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=gphtk&earg=pdsf&prid=f9608865-b4c0-4acd-8ae2-ee2e83d01fd0
[41] *Am. Guarantee & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 617 (5th Cir. 2001), Retrieved from: https://plus.lexis.com/search/?pdmfid=1530671&crid=3f7ffa69-65c8-4278-8d81-617333f36725&pdsearchterms=American+Guar.+%26+Liab.+Ins.+Co.+v.+1906+Co.%2C+273+F.3d+605%2C+617+(5th+Cir.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=8g_tk&earg=pdsf&prid=e1aa8d24-989a-4576-b130-c1fad91b2aab
[42] See *Fitzmaurice v. United States*, 1999 U.S. Dist. LEXIS 9000, (S.D. Tex. 1999), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=eefc18e3-7677-4f47-9872-f4613581a453&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3WS0-WR10-0038-Y1J1-00000-00&pdcontentcomponentid=6415&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=ce9c4821-39d3-4c57-96a8-fc24a5531a4c (The IRS was held to be liable for misallocation of funds, though the case was dismissed a lack of subject matter jurisdiction as the defendant did not utilize the IRS' internal appeal process)
[43] Amy McCarthy, *When Government Could Not, Mutual Aid Kept Texans' Needs Met Through Winter Storm Uri*, Eater Houston, (Feb. 22, 2021), Retrieved from: https://houston.eater.com/22293485/mutual-aid-groups-disaster-relief-texas-winter-storm-uri; Jamil Donith, *Unfair Distribution Causes Failure in Disaster Relief to Vulnerable Populations*, (Apr. 06, 2021), Retrieved from: https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/05/unfair-distribution-causes-failure-in-disaster-relief-to-vulnerable-populations-
[44] *United States v. Gaubert*, 499 U.S. 315, 324 (1991), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=b9ae7668-3c47-4777-884e-009bc91b54ef&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S65-KV20-003B-R2J3-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&ecomp=gf4hk&earg=sr0&prid=f852f8eb-19cf-4689-9caa-092cf17eb99f
[45] *Id.*
[46] 5 CFR § 4601.105, Retrieved from: https://www.law.cornell.edu/cfr/text/5/4601.105, 5 CFR § 4601.108, Retrieved from: https://www.law.cornell.edu/cfr/text/5/4601.108
[47] This course of action of action is unlikely to succeed because it is almost impossible to prove.

An action more likely to succeed would be to argue negligence in failing to adequately provide aid. As aforementioned, there are various instances where harm was suffered due to FEMA not providing sufficient assistance to vulnerable communities its internal rules require it to serve.[48] The third step of the analysis, whether another statute takes priority over the APA, is now in play.

No Preclusion

Denial of funding would be an instance where it is unclear whether a government actor's conduct is statutorily required. In such circumstances the Federal Torts Claims Act (FTCA) and the SDREAA are the relevant statutes to assessing whether the APA applies. The former establishes sovereign immunity for the federal government under the Discretionary Function Exception (DFE).[49]

This clause exempts litigation in instances pertaining to "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[50] A similar clause is found in the SDREAA, which protects the federal government for being sued for "for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty."[51] The argument to be made is thus that neither statute takes authority over the APA because FEMA's conduct was not discretionary, and these clauses do not apply.

The Supreme Court in *United States v. Gaubert*, provided a two-part test for assessing whether the DFE applies. First, is if the actor has discretion; if this is not the case, then this clause does not apply.[52] The Fifth Circuit has recognized matters pertaining to allocation of funds by FEMA to be discretionary in nature.[53] However this case is distinguishable as it does not FEMA's internal requirements mandating it provide better assistance to vulnerable communities. FEMA's allocation of funding may be discretionary, but its failure to abide by its own internal policies which resulted in harm is not.[54] It would be within the discretion of the agency to selectively choose when and when not follow its own rules, to determine otherwise would be absurd.

Should discretion be established, the next step of the test is to ascertain whether the actor's decision is based on public policy considerations.[55] If the decisionmaker's decision is susceptible to policy analysis, then the answer is yes and there would be sovereign immunity.[56] The best argument to made at this stage would be that allocation of funding under FEMA is more so driven by FEMA's internal policy considerations and not necessarily the public interest.[57]

No Other Adequate Remedy

Government attorneys will argue there is an adequate remedy for denial of funding via FEMA's own internal appeals system. According to the Fifth Circuit, the alternative remedy does not need to be "as effective as an APA lawsuit," but merely provide the "same genre" of relief.[58] The argument to be made is thus that the type of relief offered through FEMA's internal appeals courts is not the "same genre" that can found via judicial review.

There is little guidance as to the adequacy of FEMA's internal procedures, however in the case of other agencies courts turn to the type of relief claimed and the extent to which it is available.[59] For instance, in the case of a Medicare carrier the Supreme Court looked to the governing statute and assessed if the relief sought was available under it.[60] The court held that the relief being sought was an order obliging the agency to provide payments that were denied, something that was

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[48] This will be a tricky argument to make, as government attorneys will argue that FEMA's failure to provide funding did not cause the harm but rather failed to address the harm caused by Storm Uri.
[49] 28 U.S.C. § 2680(a), Retrieved from: https://www.law.cornell.edu/uscode/text/28/2680
[50] *Id.*
[51] 42 U.S.C. § 5148, Retrieved from: https://www.fema.gov/sites/default/files/2020-03/stafford-act_2019.pdf
[52] *United States v. Gaubert*, 499 U.S. 315, (1991), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=b9ae7668-3c47-4777-884e-009bc91b54ef&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S65-KV20-003B-R2J3-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&ecomp=gf4hk&earg=sr0&prid=f852f8eb-19cf-4689-9caa-092cf17eb99f
[53] *St Tammany Par. v. FEMA*, 556 F.3d 307, (5th Cir. 2009), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=b8c963e1-1aae-4eef-8aea-3f3362c1ee1d&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4VP6-KKN0-TXFX-72DM-00000-00&pdcontentcomponentid=6389&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=9fbf57b0-44b9-41b7-a62b-7965be39a706
[54] Very difficult argument to make, FEMA would likely be found to have sovereign immunity here. We would have to prove FEMA deliberately chose to not provide sufficient funding to vulnerable communities.
[55] *Gaubert*, 499 U.S. at 324, Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=b9ae7668-3c47-4777-884e-009bc91b54ef&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S65-KV20-003B-R2J3-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&ecomp=gf4hk&earg=sr0&prid=f852f8eb-19cf-4689-9caa-092cf17eb99f
[56] *Id.* at 325, Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=b9ae7668-3c47-4777-884e-009bc91b54ef&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S65-KV20-003B-R2J3-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&ecomp=gf4hk&earg=sr0&prid=f852f8eb-19cf-4689-9caa-092cf17eb99f
[57] Practically impossible to win at this point, given that our very own argumentation is engaging in policy analysis of FEMA's decisions.
[58] *De La Garza Gutierrez v. Pompeo*, 741 F. App'x 994, 998 (5th Cir. 2018), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5STP-CP41-DXPM-S1W3-00000-00&pddocid=urn%3AcontentItem%3A5STP-CP41-DXPM-S1W3-00000-00&pdcontentcomponentid=6389&crid=e610c273-bc0c-47a9-adbc-77f86b1b6ced
[59] *Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=5021f0fa-e87c-407a-9387-772dc8dae479&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-DT30-003B-431S-00000-00&pdcontentcomponentid=6443&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=854c58be-a5ae-4965-876a-208bb2206c10&ecomp=gf4hk&earg=sr7
[60] *Id.*

not covered by the statute.[61] Monetary relief equivalent to the amount denied was available via an alternative remedy, but this was not what the court held as being sought.[62]

Therefore, in the case of FEMA, we have a strong chance at contending the insufficiency that the relief being sought is not simply damages but rather an injunction demanding FEMA take a particular course of action which in this case would be giving appropriate monetary relief. The argument could also be construed as seeking a retrial for the wrongful denial of an appeal, which has persuaded the Fifth Circuit before.[63]

The SDREAA is unclear in terms of the exact type of relief FEMA provides through its appeals process.[64] This ambiguity works in our favor, as the lack of clarify in the statute would generate a stronger presumption in favor of judicial review to resolve the uncertainty.

Courts tend to rule against plaintiffs when they fail to utilize the internal procedures of a government agency before filing an APA claim.[65] It is important to seek relief through FEMA's internal procedures before appealing to the courts.

State

For our purposes, the most likely target of litigation at the state level would be ERCOT. The initial consideration to be made is whether it constitutes a "governmental unit" that would possess sovereign immunity under Texas common law, as defined by the Texas Tort Claims Act.[66] The Texas Supreme Court has declined to make a judgment call on the matter, tossing out a case for which ERCOT's classification was an essential question for lack of jurisdiction.[67] There is another widely anticipated case with the same central issue, *Electric Reliability Council of Texas Inc. v. Panda Power Generation Infrastructure Fund LLC*, awaiting a decision from the Texas Fifth Circuit[68] and following it closely is advised.

Given that the former CEO of ERCOT Bill Magness testified under oath to the Texas Legislature that ERCOT is not a government unit but rather "a private Texas corporation",[69] there is a strong presumption in finding ERCOT to not be a governmental unit and therefore not have sovereign immunity. In addition, ERCOT and Attorney General Ken Paxton are currently arguing that it is not a governmental unit and therefore not subject to the disclosure requirements of the Texas Freedom of Information Act.[70] By its own admission, ERCOT should have sovereign immunity.

ERCOT is also simultaneously arguing that it is a governmental unit that should have sovereign immunity but is also not a governmental unit and thus is not subject to disclosure requirements.[71] This strategy has been attempted before by the University of the Incarnate Word and ended in the Texas Supreme Court ruling that it is not a governmental unit and therefore does not have sovereign immunity.[72] These cases are quite analogous and bode well for ERCOT not being exempt from liability.

Exceptions

Nevertheless, assuming that ERCOT is a government unit, the Texas Tort Claims Act would waive its sovereign immunity for tort claims, such as our negligence claim for failing to winterize the power grid, under certain circumstances.[73] The most relevant of which are as follows.

Use of Property

Governmental units in Texas are liable for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas

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[61] *Id.*
[62] *Id.*
[63] *Wolcott v. Sebelius*, 635 F.3d 757, 770 (5th Cir. 2011), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=e1a49318-25c7-48a0-9f4a-c821dc56f210&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A52CY-JP31-652R-32FB-00000-00&pdcontentcomponentid=6389&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=854c58be-a5ae-4965-876a-208bb2206c10&ecomp=gf4hk&earg=sr1
[64] 44 CFR § 204.54, Retrieved from: https://www.law.cornell.edu/cfr/text/44/204.54
[65] *Hinojosa v. Horn*, 896 F.3d 305, 312 (5th Cir. 2018), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=a358ed35-4d9a-4e21-b307-4381a6d0e054&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5S8S-DVJ1-JW09-M515-00000-00&pdcontentcomponentid=6389&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=e0a15b1b-dc0f-479b-beeb-882700669504&ecomp=gf4hk&earg=sr0
[66] Tex. Civ. Prac. & Rem. Code § 101.025, Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm
[67] *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628 (Tex. 2021), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=7707ecc5-2e7f-4ef8-b317-8273faffe53e&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A627S-F9G1-JW5H-X3WV-00000-00&pdcontentcomponentid=10617&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=874ca0c3-960e-427b-aa4a-dee1f1e0af8e
[68] Deanna R. Reitman & Mark A. Waite, *ERCOT v Panda: The Texas Supreme Court's non-decision on ERCOT immunity*, DLA Piper, (Mar. 29, 2021), Retrieved from: https://www.dlapiper.com/en/us/insights/publications/2021/03/ercot-v-panda-the-texas-supreme-court/
[69] Husch Blackwell, *Texas Supreme Court to Decide if ERCOT Is Immune from Winter Storm Lawsuits*, (Mar. 30, 2021), Retrieved from: https://www.huschblackwell.com/newsandinsights/texas-supreme-court-to-decide-if-ercot-is-immune-from-winter-storm-lawsuits
[70] Rick Casey, *ERCOT'S convenient identity crisis*, The San Antonio Report, (Jun 29, 2021), Retrieved from: https://sanantonioreport.org/ercot-convenient-identity-crisis/
[71] *Id.*
[72] Emily Donaldson, *Court Ruling Paves Way for Wrongful Death Suit in 2013 UIW Police Shooting*, The San Antonio Report, (May 22, 2020), Retrieved from: https://sanantonioreport.org/court-ruling-paves-way-for-wrongful-death-suit-in-2013-uiw-police-shooting/
[73] Tex. Civ. Prac. & Rem. Code § 101.025, Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm

law."[74] For this argument to work, we need to prove (1) the energy grid constitutes "personal or real property" of which (2) the use of (3) caused (4) personal injury and/or death and (5) a private person in ERCOT's position would be liable.

As for the first requirement, Texas courts typically assess whether or not something constitutes "personal or real property" on the basis of tangibility.[75] The energy grid is tangible in that it physically exists, and it is run by ERCOT and there constitutes "personal or real property."

The second criterion is more difficult to prove. Failing to properly winterize the energy grid would not constitute a "use" as it would be more of a non-use. A failure to do something, not using property when one ought to have, would not waive liability under the Texas Torts Claims Act according to the Texas Supreme Court.[76] However, the decision by ERCOT to shut down the power grid could be construed as a relevant "use" that would trigger a waiver of sovereign immunity. According to the Supreme Court, a "use" requires tangible property to be employed towards a particular purpose.[77] The grid is tangible property that is being shut down for the purpose of preventing wider scale blackouts, this condition is therefore met.[78]

The third condition also presents a high bar. For the usage of the energy grid to have caused the injury there has to be proximate cause.[79] For this to be the case there must be but-for causation[80], and this is true. Government attorneys will argue that the personal death and injury endured was caused by adverse weather conditions, and not a lack of electricity. However, had victims had electricity and heating available they would not have suffered injuries from the cold. In addition, we would need to show foreseeability[81] which is self-evident. People suffering injuries due to not having heating during a blizzard is readily foreseeable.

The fourth criterion is evidently met, there have been countless cases of personal injury and deaths in the aftermath of Storm Uri. The fifth criterion is met as well, a landlord in Texas that was negligent in maintaining energy for a unit would certainly be liable for damages incurred due to the tenant lacking energy.

Premise/Special Defect

Governmental units in Texas are liable for damages when a claim arises from a premise or special defect.[82] Liability is greater for a special defect, however the text of the statute when giving examples refers to "traffic signs, signals or warning devices,"[83] suggesting the special defects are only applicable in the context of traffic accidents. This interpretation is supported by the Fifth District of the Texas Court of Appeals, narrowly defining special defects as referring to highway obstructions specially.[84] Nevertheless, we can raise the argument that defects in the power grid, a lack of winterization, led to highway obstructions as traffic signals and warning devices ceased working as a result.[85]

If the lack of winterization of the power grid is found to be a "special defect" then ERCOT "owes the duty that a private person would owe to an invitee".[86] This entails the duty to use (1) reasonable care to eliminate (2) an unreasonable risk of harm (3) created by a premises condition of which (4) the government unit is or reasonably should be aware."[87]

Winterizing the grid certainly falls under reasonable care and would not be an undue burden. The cost doing so is not only minimal, but ERCOT would have make long-term profit in energy savings.[88] The severe personal injury/death experienced would naturally be an unreasonable risk of harm. A "special condition" is a type of "premises condition"[89], so this is already proven in prior analysis. ERCOT certainly was aware or should have been aware that their energy grid was not winterized and there would be severe dangers in not doing so. After all, the Federal Energy Regulatory Commission and

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[74] *Id.* § 101.021(2)
[75] *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994)
[76] *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 586 (Tex. 1996), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=94899108-1b99-4f40-9fba-cc96d26f1267&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S3J-W4C0-003C-204G-00000-00&pdcontentcomponentid=10617&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=ec234458-e119-4dda-bcfc-21b2ec804a65
[77] *Id.*
[78] This argument is a bit of a stretch, but what is exactly a "use" is inconsistent in the Texas courts.
[79] *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 929 (Tex. 2015), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=68fe377d-5df3-4790-926a-bdee2e8f85bd&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5F7K-TVY1-F04K-D007-00000-00&pdcontentcomponentid=10617&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=d3c9f3de-2e71-4983-ab9a-ccece7ccb1cd&ecomp=gf4hk&earg=sr0
[80] *Id.*
[81] *Id.*
[82] Tex. Civ. Prac. & Rem. Code § 101.022, Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm; Generally speaking, this is a dubious route to go down. Premises liability has to do with someone being injured on the premises of another due to the faulty condition of the premises, it is a real stretch to claim that the power grid was a "premises" that people would be injured upon.
[83] *Id.* § 101.022(b)
[84] *City of Dall. v. Freeman*, 2019 Tex. App. LEXIS 6090 at *8, (Tex. App.—Dallas July 17, 2019)
[85] Difficult argument to win, "special defects" are defined very narrowly.
[86] *Freeman*, 2019 Tex. App. LEXIS 6090 at *8
[87] *City of Austin v. Rangel*, 184 S.W.3d 377, 383 (Tex. App.—Austin 2006)
[88] How Much Will, *HOW MUCH WILL IT COST TO WINTERIZE THE TEXAS POWER GRID?*, (Jul.19, 2021), Retrieved from: https://howmuch.news/how-much-will-it-cost-to-winterize-the-texas-power-grid/#:~:text=RELATED%3A%20Texas%20House%20stands%20ready%20to%20pass%20laws,even%20higher%20at%20%24%2060%2C000%20to%20%24%20600%2C000
[89] Tex. Civ. Prac. & Rem. Code § 101.022, Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm

the North American Electric Reliability Corporation had warned the state of Texas a decade ago that its energy infrastructure was ill-equipped to handle cold conditions.[90] Not to mention the state had experienced energy issues prior due to the 2011 Groundhog Day Blizzard[91], they ought to have seen a power collapse such as this coming. Thus, sovereign immunity can be circumvented.[92]

Should the "special defect" argument fail there is still a case to be made that there was a "premises defect". Neither term is defined by the Texas Tort Claims Act, however the Supreme Court of Texas has determined that analysis of the matter requires one to see if an injury was caused by a condition or an activity.[93] If it is the former, then there is greater consideration in determining something to be a "premises defect".[94] The relevant condition in this case would that the power grid was not winterized, injuries resulted from this lack of winterization causing the entire grid to collapse. Thus, there is a clear argument to be made that there was a "premises defect" ERCOT can be held liable for.

The liability for a "premises defect" if the victim is paying for the premises is that same as that for a "special defect"[95], of which the analysis was already discussed. Nevertheless, government attorneys will contend that Texan residents are not paying for the grid itself but rather the power it generates, that the entity being paid are power companies and not ERCOT and that some who were injured were not Texas residents and therefore do not pay for the use of the premises. In such cases, ERCOT would be held to the lesser standard of "the duty that a private person owes to a licensee."[96]

To prove liability under a licensee duty, one must prove the same conditions as that of an invitee duty[97] of which we have already done so in the special defect analysis. However there two key differences, first we must demonstrate that ERCOT knew that the power grid was unwinterized as the ought to have known standard is not sufficient.[98] The aforementioned warnings from various federal agencies and that ERCOT experienced a similar loss of power due to a blizzard ten years ago would be naturally sufficient to meet this standard. Second, we need to prove that the victims did not know the power grid was not winterized.[99] That should be straightforward, the average Texan would not have a strong understanding of the power grid of their own state and affirmations from victims under oath that they did not know should be enough to meet this standard.

Joint Enterprise

When a government unit in Texas engages in a joint enterprise with another party, it is considered to have waived sovereign immunity and is responsible for the conduct of the other party.[100] As a membership-based organization, ERCOT is comprised of consumers, electric cooperatives, generators, power marketers, retail electric providers, investor-owned electric utilities (transmission and distribution providers), and municipally owned electric utilities.[101] This could be argued to effectively form a joint enterprise under which each member is liable for the conduct of its other members.

The first requirement for proving a joint enterprise exists is there must be an agreement among the members of the group.[102] This is quite clearly the case, ERCOT's membership agreement is publicly accessible.[103] The second requirement is that there must be a "a common purpose to be carried out by the group."[104] In this case it would be to facilitate energy transactions in the state of Texas.[105]

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[90] Federal Energy Regulatory Commission & North American Electric Reliability Corporation, *Report On Outages And Curtailments During The Southwest Cold Weather Event Of February 1-5, 2011*, (Aug. 2011), Retrieved from: https://www.ferc.gov/sites/default/files/2020-04/08-16-11-report.pdf

[91] Michael Cooper, *As Much of the Nation Digs Out, a Freeze Sets In*, The New York Times, (Feb. 2, 2011), Retrieved from: https://www.nytimes.com/2011/02/03/us/03storm.html

[92] Proving that the duty of care was not met will be straightforward, initially proving that there was a "special defect" will be much more difficult.

[93] *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 388 (Tex. 2016), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=b422f60f-d5e4-4d55-8a96-c8dea00a4eb1&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5K03-9N61-F04K-D0FJ-00000-00&pdcontentcomponentid=10617&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=2fc537bd-96fc-41c4-82a1-002b82c66b87

[94] *Id.*

[95] *City of Fort Worth v. Posey*, 593 S.W.3d 924, 927 (Tex. App.—Fort Worth 2020), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=92592495-d5ef-4442-b2f7-7050c5b241ac&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5Y0H-SFK1-JTNR-M2HF-00000-00&pdcontentcomponentid=10618&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr1&prid=0955c8a0-a455-42f5-ba24-2295541ea8ae

[96] Tex. Civ. Prac. & Rem. Code § 101.022(a), Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm

[97] *Sampson* , 500 S.W.3d 380 at 391, Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=5be93c31-c552-41f9-b8c7-1e14f0b969aa&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5K03-9N61-F04K-D0FJ-00000-00&pdcontentcomponentid=10617&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr0&prid=1c063428-97fd-4bbb-ba7b-345445067708

[98] *Id.*

[99] *Id.*

[100] *Tex. DOT v. Able*, 35 S.W.3d 608, 613 (Tex. 2000), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=461d60ba-d15b-4338-b0f4-fb5815f18348&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A40NG-CW80-0039-43V5-00000-00&pdcontentcomponentid=10617&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=231548e2-b25a-45b0-afc0-1c1cbe8585f1&ecomp=gf4hk&earg=sr10

[101] ERCOT, *Membership*, (2021), Retrieved from: http://www.ercot.com/about/governance/members/

[102] *Able*, 35 S.W.3d 608 at *613

[103] ERCOT, *2021 ERCOT Membership Application and Agreement*, (2021), Retrieved from: http://www.ercot.com/content/wcm/key_documents_lists/214697/10012020121341-2021_ERCOT_Membership_Application_and_Agreement.docx

[104] *Able*, 35 S.W.3d 608 at *613

[105] We are probably going to lose on this point, as the members of ERCOT all have different goals: to make a profit, to consume energy, to regulate the energy market...

The third requirement is that a joint enterprise must be "a community of pecuniary interest."[106] The strongest argument we can make to this end is that every member has financial considerations, some want to consume energy at the lowest price possible while others wish to make a profit.[107] The fourth and final criterion is that "an equal right to a voice in the direction of the enterprise."[108] While the Texas legislature does have ultimate authority in governing ERCOT's actions, it can be argued that the organization enjoys considerable autonomy and that each member has an equal say in influencing its decision-making.

Should a joint enterprise be proven to exist between the various members of ERCOT or ERCOT and its partners such as various Texas power companies, then sovereign immunity is waived and ERCOT can be sued for the negligent conduct of its partners.

Exceptions to Exceptions

Emergency Situation

The Texas Tort Claims Act also outlines conditions under which the above waivers of sovereign immunity do not apply.[109] The most relevant is that giving immunity to governmental units "reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action."[110]

There is no question that Storm Uri was an "emergency situation" however there is a lack of clarity as to what laws govern. The Texas Disaster Act is concerned with preparing for a disaster and not responding during one, and ERCOT's internal regulations are similarly unclear. In situations lacking clarity the Texas Tort Claims Act provides a separate test, if "the action is not taken with conscious indifference or reckless disregard for the safety of others."[111]

The Texas Supreme Court defines both "conscious indifference" and "reckless disregard" as "an act or omission involving an extreme risk to others, an actual awareness of that risk, and knowledge that harm was a highly probable consequence of the act or omission."[112] Employees of ERCOT reacted to Storm Uri and chose to avert a longer-term blackout by temporarily shutting down the power grid.[113] This act certainly involved an extreme risk to the entire Texas population, a risk that anyone but especially highly trained electrical engineers at a state agency would be aware of and would absolutely result in harm.

Government attorneys would argue that to not shut down the power grid is what would demonstrate conscious indifference, as not doing so would result in a longer blackout that would cause even more harm. That employees of ERCOT acted to minimize harm would suggest a lack of conscious indifference or reckless disregard. The harm that was incurred because of their actions would have been suffered anyway.

It is unclear what the standard is when harm is caused to prevent a greater harm. Nonetheless this exception can be circumvented by contending that we are not pursuing legal action for ERCOT's conduct in reacting to Storm Uri but rather their negligence in not winterizing the power grid prior to it.

Discretionary Powers

Governmental units are also exempt for liability for not "performing an act that the unit is not required by law to perform."[114] If ERCOT is not required by law to winterize the power grid (assuming that it is a governmental unit) then it cannot be held liable for not doing so. The strongest argument we can make is that ERCOT is legally required to "maintain the reliability and security of the ERCOT region's electrical network"[115] and that doing so entails ensuring that the power grid is sufficiently winterized.[116]

Damage Limitations

The Texas Tort Claims Act restricts damages for actions against a governmental unit to $250,000 per person, $500,000 for each occurrence of bodily injury or death and $100,000 for each occurrence of property damage.[117]

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[106] *Able*, 35 S.W.3d 608 at *613
[107] Probably going to lose on this argument, as ERCOT is a non-profit organization.
[108] *Able*, 35 S.W.3d 608 at *613
[109] Tex. Civ. Prac. & Rem. Code Subchapter C, Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm
[110] *Id.* § 101.055(2)
[111] *Id.*
[112] *Tarrant Cty. v. Bonner*, 574 S.W.3d 893, 901 (Tex. 2019), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=ef80eaaf-daec-4593-8ee9-a1b277484ddf&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5W5Y-VGW1-DY33-B191-00000-00&pdcontentcomponentid=10617&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=4107893d-bd57-4e6c-9a76-6ef2fb0615d8&ecomp=gf4hk&earg=sr0
[113] Yaron Steinbuch, *Texas power grid was 4 minutes, 37 seconds away from 'total collapse'*, The New York Post, (Feb. 25, 2021), Retrieved from: https://nypost.com/2021/02/25/texas-power-grid-was-minutes-away-from-total-collapse/
[114] Tex. Civ. Prac. & Rem. Code § 101.056(1), Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm
[115] Tex. Admin. Code §25.361(4), Retrieved from: https://www.law.cornell.edu/regulations/texas/16-Tex-Admin-Code-25-361
[116] It would take a miracle for us to win on this point, the consensus among legal and industry experts is that ERCOT is not legally obliged to winterize the state power grid. See Avery Travis, *Winter preparedness not mandatory at Texas power plants and generators, despite 2011 report*, (Feb.17, 2021), Retrieved from: https://www.kxan.com/investigations/winter-preparedness-not-mandatory-at-texas-power-plants-and-generators-despite-2011-report/
[117] Tex. Civ. Prac. & Rem. Code § 101.023(a), Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm

County

Counties are explicitly described as "government units" that would be exempt from liability in the Texas Tort Claims Act.[118] Unlike municipalities, the Texas Tort Claims Act does provide a separate framework and thus they would be subject to the same exceptions, tests and analysis that any other state agency would be.

Which exceptions do and do not apply would depend on the county in question, however premises defect claims would be especially useful in this context. Any injuries that resulted from poor local infrastructure or other structural defects of county property that were exuberated by Storm Uri would have a strong claim for waiving sovereign immunity.

Municipal

Municipalities are "governmental units" under the Texas Tort Claims Act.[119] However the statute itself acknowledges several relevant exceptions under which they can be liable.[120] In general, a municipality is not liable for damages resulting from its "governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public."[121] What constitutes such functions will vary by municipality however the Texas Tort Claims Acts provides a limited, but not comprehensive, list of examples in Section 101.0215(a).[122]
The most relevant ones for our purposes would be the exceptions for damages resulting from misuse of "police and fire protection and control,"[123] "hospitals,"[124] "operation of emergency ambulance services,"[125] and "engineering functions."[126] On the other hand, municipalities can be sued for "proprietary functions."[127] These will vary by municipality but the Texas Tort Claims Acts provides a limited, but not comprehensive, list of examples in Section 101.0215(b).[128]

The most relevant one for our purposes is "the operation and maintenance of a public utility,"[129] which would include electricity. This greatly increases the litigation that can be undertaken against municipalities, as they can be held responsible for failures in providing adequate energy services in the wake of Storm Uri. Litigation pertaining to a general failure to prepare for an emergency will be more difficult, the key will be to frame emergency preparation as "proprietary functions" and not "government functions".

Is there liability despite sovereign immunity?

Federal

Federal law waives sovereign immunity when the federal government violates a constitutional right.[130] In the context of FEMA it is unclear if a failure to provide adequate implicates the constitution. There has been speculation that FEMA's prior policy to not funding to churches was a violation of one's freedom to practice religion[131] under the First Amendment[132]. However, this was never tested by the courts as FEMA changed its internal policy. If that was a constitutional violation, then it would be reasonable to argue that inadequacy in funding minority communities would violate anti-discrimination protections based on race under the Fourteenth Amendment.[133] Proving deliberate discrimination would be almost impossible, however a systematic argument could work although it is unclear if the Fourteenth Amendment protects against systematic or unintentional discrimination in addition to deliberate discrimination.

On a final note, should litigation against FEMA be successful, there will still be substantial limitations on available damages. Specifically, the Fifth Circuit has ruled there is to be no pretrial interest in cases against the federal government unless explicitly created by statute of contractual relationship.[134] Neither of which is the case here.

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[118] *Id*, § 101.001(3)(B)
[119] Tex. Civ. Prac. & Rem. Code § 101.001(3)(B), Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm
[120] *Id.* § 101.0215(a)
[121] *Id.*
[122] *Id.*
[123] *Id.* § 101.0215(a)(1); For failing to provide sufficient assistance in the wake of the crisis.
[124] *Id.* § 101.0215(a)(8); For failing to provide adequate healthcare in the wake of Storm Uri.
[125] *Id.* § 101.0215(a)(18); For failing to provide adequate healthcare in the wake of Storm Uri.
[126] *Id.* § 101.0215(a)(30); For failing to provide backup power, or other engineering failures that exacerbated the power failure in the wake of Storm Uri.
[127] *Id.* § 101.0215(b)
[128] *Id.* § 101.0215(b)
[129] *Id.* § 101.0215(b)(1)
[130] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 393 (1971), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=f257ffb4-115a-4542-b983-3286146aeae5&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-DF70-003B-S21D-00000-00&pdcontentcomponentid=6443&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr5&prid=9a26a3f5-d0a3-45bf-9c4a-e2377a8bd5dd
[131] U.S. Const. Amend. I, Retrieved from: https://constitution.congress.gov/constitution/amendment-1/
[132] William P. Marshall, *Does the First Amendment Prevent or Allow FEMA to Provide Disaster Aid to Churches?*, Public Health Reports, (Dec. 7, 2017), Retrieved from: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5805100/
[133] U.S. Const. Amend. IV § I, Retrieved from: https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv
[134] *In re Estate of Lee*, 812 F.2d 253, 256 (5th Cir. 1987), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=68927c8e-4799-4ff6-90f2-9a87c0c03731&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-C1N0-001B-K3TS-00000-00&pdcontentcomponentid=6389&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=gf4hk&earg=sr4&prid=3b2dc895-9ca3-43aa-b2a6-3cc0a9e45e6e

State

Sovereign immunity is waived in instances where Texas' conduct is in violation of the federal[135] or its own constitution.[136] There have already been lawsuits being filed against ERCOT alleging state constitutional violations[137], albeit by power companies and municipalities, and it is advised to follow them closely.

In addition, the Abrogation Doctrine allows federal Congress to waive sovereign immunity for states via statute or constitutional amendment when states exercise power delegated to them by the federal government under any Amendment passed after the Eleventh.[138] This is frequently used in civil rights litigation under the Fourteenth Amendment, and a cause of action alleging systematic discrimination in how ERCOT and other Texas state agencies failed to meet the need of minority communities has a strong chance of succeeding. Putting pressure on members of Congress at the federal level to remove ERCOT's sovereign immunity would also a useful course of action.

Also, the Texas Supreme Court has held that sovereign immunity at the state level can be ignored with consent from the state legislature.[139] This is because state law allows for immunity to be waived if "the governmental unit consents.[140] The legislature has the authority to consent to lawsuits on behalf of any Texas state agency, county or municipality via the passing of a statute.[141]

Though there is nothing in the Texas Public Utility Regulatory Act suggesting that the legislature has already waived immunity on behalf of ERCOT[142], it would still be an advisable tactic to pressure the state legislature into doing that just that. It would be wise to exploit their tendency towards self-preservation and encourage redirecting the ire of voters away from them and towards ERCOT. Further, ERCOT's argument that it is not a governmental unit for the purposes of the Texas Freedom of Information Act could be construed as an internal waiver of sovereign immunity.

What is the responsibility of the Texas Governor?

The Texas Disaster Act contains various provisions mandating that Governor perform or not perform certain acts. Most notably the "governor is responsible for meeting (1) the dangers to the state and people presented by disasters; and (2) disruptions to the state and people caused by energy emergencies."[143]

Though the statute does not outline penalties should the governor fail to meet his responsibilities and there is a lack of judicial clarification, it would still be advised to file a suit against Gregg Abbott for failing to meet those responsibilities. Various pieces of successful litigation have been filed against sitting Texas governors. If nothing else the optics could compel the state to act.

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[135] 42 U.S.C § 1983, Retrieved from: https://www.law.cornell.edu/uscode/text/42/1983
[136] *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 782 (Tex. 2005), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4HMG-P790-TVWX-8243-00000-00&pddocid=urn%3AcontentItem%3A4HMG-P790-TVWX-8243-00000-00&pdcontentcomponentid=10617&crid=b9e953c7-8a87-4889-9012-ce0a8a7898b4
[137] *CPS Energy v. ERCOT*, Retrieved from: https://www.cpsenergy.com/content/dam/corporate/en/Documents/2021-03-12%20CPS%20Energy%20Original%20Petition%20w%20Ex%20A(117202625_1).PDF; *City of Denton v. ERCOT*, Retrieved from: https://www.cityofdenton.com/CoD/media/City-of-Denton/Government/Legal/Denton-v-ERCOT-Original-Petition-(file-marked-2021-02-25).pdf
[138] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-455 (1976)
[139] *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008), Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=62c08f02-5dd2-486e-b6d0-d406db117bc5&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4S5D-DSF0-TX4N-G162-00000-00&pdcontentcomponentid=10617&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=857703a4-e528-4702-a4df-4f21f0684719&ecomp=gf4hk&earg=sr0
[140] Tex. Civ. Prac. & Rem. Code § 101.006(6), Retrieved from: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm
[141] *Garcia*, 253 S.W.3d at 659, Retrieved from: https://plus.lexis.com/document/?pdmfid=1530671&crid=62c08f02-5dd2-486e-b6d0-d406db117bc5&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4S5D-DSF0-TX4N-G162-00000-00&pdcontentcomponentid=10617&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=857703a4-e528-4702-a4df-4f21f0684719&ecomp=gf4hk&earg=sr0
[142] 1997 Tex. SB 1751, Retrieved from: https://statutes.capitol.texas.gov/Docs/UT/htm/UT.39.htm
[143] Tex. Gov't Code § 418.011, Retrieved from: https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm

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June 14, 2021

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

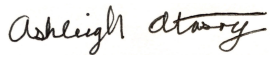
I am a second-year student at the University of California, Berkeley, School of Law applying for a 2022-2024 term clerkship in your chambers. As a future prosecutor, I am constantly seeking new opportunities to observe court and refine my legal writing. My time in the Office of the Federal Defender provided extensive experience with habeas petitions, and I am thrilled for the opportunity to continue this work in your chambers as I begin my career.

My extensive writing experience will be an immediate asset to your chambers. I recently submitted an amicus brief to the Supreme Court of Japan with Berkeley Law Professor David Oppenheimer. We wrote the brief on behalf of a human rights lawyer and #MeToo advocate, urging the court to adopt American defamation standards. Further, I spent countless hours with the Office of the Federal Defender editing habeas petitions for the Eighth Circuit. I am currently cite checking and editing a constitutional law textbook for Berkeley Law professors Jodi Collova and Bill Fernholz.

Enclosed please find my resume, law school transcript, and writing sample. Berkeley Law professors David Oppenheimer and Kerry Kumabe and Mr. Scott Braden from the Office of the Federal Defender have written recommendation letters.

Thank you for your time and consideration of my application. I welcome any opportunity to speak further about this clerkship.

Sincerely,



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EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
Juris Doctor Candidate, May 2022
Honors: Henderson Center Scholar, Second-Year Academic Distinction (Top 25%)
Activities: Berkeley Trial Team, Police Review Project (President), Bales Trial Competition (Director)

University of Missouri, Columbia, MO
Bachelor of Science, *summa cum laude*, in Business Administration, Emphasis in Finance, May 2018
Activities: Campus Tour Guide, Cornell Leadership Program, Kappa Alpha Theta

EXPERIENCE

United States Department of Justice, Public Integrity Section, Washington, D.C.
Law Clerk Sept. 2021 – Dec. 2021
Will write and file briefs on issues related to the section's work in public and election corruption cases.

San Francisco District Attorney's Office, San Francisco, CA
General Felonies Certified Law Clerk | Fair and Just Prosecution Summer Fellow June 2021 – Aug. 2021
Appear at felony arraignments and preliminary hearings. Draft motions, write memos. Conduct research on pre-trial detainment assessment tools to write a policy proposal for the San Francisco District Attorney's office.

East Bay Community Law Center, Berkeley, CA
Clean Slate Clinic Certified Intern Aug. 2020 – Dec. 2020
Appeared in municipal court. Won a three-DUI § 1203.4 dismissal, a § 17(b) felony reduction for a controlled substance conviction, and a § 1204.3 dismissal for a controlled substance conviction. Wrote memos on California clean slate laws. Interviewed and communicated case updates with clients.

Office of the Federal Public Defender (Capital Habeas Unit), Little Rock, AR
Legal Intern, Keta Taylor Colby Death Penalty Project May 2020 – Aug. 2020
Facilitated weekly meetings with death row clients. Met with clients awaiting sentencing at the trial level. Observed sentencing, plea change, bond rehearing, and arraignment in federal court. Drafted a motion in limine. Researched and wrote memos on preemptory strikes, search warrants, and hearsay exceptions. Pitched and implemented data project analyzing racial disparities in federal charges.

Booz Allen Hamilton, Washington, D.C.
Department of Defense (DoD) Senior Consultant with Active Secret Clearance July 2018 – July 2019
Wrote and monitored progress of 500+ requirements for a munitions analysis software. Wrote nine monthly status reports for DoD client. Wrote and edited project summaries for proposals to capture new DoD work.

True North Emergency Shelter, Columbia, MO
Victims Services Staff Member June 2014 – Sept. 2016
Obtained legal protection orders for survivors of domestic violence and sexual assault. Conducted intake and exit interviews to provide resources to clients. Operated emergency hotline for survivors and the community.

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Baking, CrossFit, road trips, journaling, volunteer mentor for high school girls

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University of California
Office of the Registrar

Ashleigh T Atasoy
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Admit Term: 2019 Fall

Printed: 2021-06-10 15:28

Academic Program History
Major: Law (JD)

2019 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure David Oppenheimer	5.0	5.0	P
LAW	202.1A	Legal Research and Writing Kerry Kumabe	2.0	2.0	CR
LAW	202F	Contracts Abbye Atkinson	5.0	5.0	P
LAW	230	Criminal Law Avani Sood	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2020 Spring

Course		Description	Units	Law Units	Grade
LAW	201	Torts Talha Syed	5.0	5.0	CR
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Kerry Kumabe	2.0	2.0	CR
LAW	203	Property Molly Van Houweling	4.0	4.0	CR
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Kristen Holmquist	4.0	4.0	CR
LAW	245.21	Intro Trial Practice 1Ls **Units Count Toward Experiential Requirement** Ioana Petrou Charles Smiley	1.0	1.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	32.0	32.0

* **Due to COVID-19, law school classes were graded credit/no pass in spring 2020.**

2020 Fall

Course		Description	Units	Law Units	Grade
LAW	241	Evidence Robert Infelise	3.0	3.0	H
LAW	244.49	Trial Competition **Units Count Toward Experiential Requirement** Spencer Pahlke	2.0	2.0	HH
LAW	264.5	Comp Equal Anti-Dis **Fulfills 1 of 2 Writing Requirements** David Oppenheimer	3.0	3.0	H
LAW	289	EBCLC Seminar Seema Patel	2.0	2.0	CR
LAW	295.5Z	EBCLC Clinic **Units Count Toward Experiential Requirement** Seema Patel	4.0	4.0	CR

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	46.0	46.0

2021 Spring

Course		Description	Units	Law Units	Grade
LAW	207.5	Advanced Legal Writing **Fulfills Either Writing Requirement/Experiential** Diana Digennaro	3.0	3.0	H
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** John Steele	2.0	2.0	HH
LAW	231.1	Crim Procedure- Adjudication Andrea Roth	4.0	4.0	P
LAW	246.1	Criminal Trial Practice **Units Count Toward Experiential Requirement** Charles Denton	3.0	3.0	HH

	Units	Law Units
Term Totals	12.0	12.0
Cumulative Totals	58.0	58.0

Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Ashleigh T Atasoy
Student ID: 3034500509
Admit Term: 2019 Fall

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	295.9A	UCDC: Law Field Placement	4.0	4.0	
		Units Count Toward Experiential Requirement			
		Susan Schechter			
		Nicole Lehtman			
LAW	295D	UCDC: Law in the Capital	3.0	3.0	
		Units Count Toward Experiential Requirement			
		Susan Schechter			
		Nicole Lehtman			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	58.0	58.0

Carol Rachwald, Registrar

University of California
Berkeley Law
270 Simon Hall
Berkeley, C 94720-7220
510-642-2278

KEY TO GR DES

1. Grades for cademic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GP s) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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University of Missouri – Columbia

Official Transcript

Date: 10/11/2020 Page: 1 of 2

Name: **Atasoy,Ashleigh Taylor**
Student ID: 16135300
Date of Birth: 09/06/XXXX
Soc. Sec. Number: XXX-XX-4671

This transcript has been produced for:

ASHLEIGH TAYLOR ATASOY

Course Number		Course Title	Grade	Hours	Remarks

Degrees Awarded
University of Missouri - Columbia
Business Administration-BSBA 05-11-2018
Finance and Banking
(Summa Cum Laude)

FALL 2014 Exam Credit

Englsh	LIT	Literature Transfer Credit	CR	3.0	
Englsh	1000	Exposition & Argumentatn	CR	3.0	
Math	1100	College Algebra	E	0.0	
Math	1160	Precalculus Mathematics	CR	5.0	
Math	1500	Analytc Geom & Calculs 1	CR	5.0	M
Pol_Sc	1100	American Government	CR	3.0	
Pol_Sc	2700	Comparatve Polit Systems	CR	3.0	

FALL 2014 Univ of MO-Col Ugrd
Undeclared, Bus or Acctcy
Political Science-BA

Commun	1200	Public Speaking	A-	3.0	
Econom	1014	Prncples of Microecon	A	3.0	
Intdsc	1001	Proseminar Intrdsc Stds	S	1.0	
Mangmt	1050	Leadership Issues	A	3.0	
Stat	2500	Intro to Prob & Statis 1	A	3.0	M

	GPA Hrs Att	Hrs Ern	Qual Pt	GPA
UGRD Term:	12.0	13.0	47.10	3.925
UGRD CUM:	12.0	35.0	47.10	3.925

Course Number		Course Title	Grade	Hours	Remarks

SPNG 2015 Univ of MO-Col Ugrd
Undeclared, Bus or Acctcy
Political Science-BA

Econom	1015	Prncpls Macroeconomics	A	3.0	
Englsh	1210	Intro to British Lit	A	3.0	
Mangmt	4185	Problem in Management	S	1.0	
Pol Sc	1400	International Relations	A+	3.0	
Pol Sc	2004	Topics in Pol Sci-Social - Terrorsm, Insurgenc/Cntr Terr	A	3.0	
Stat	3500	Intro to Prob & Statis 2	A	3.0	

	GPA Hrs Att	Hrs Ern	Qual Pt	GPA
UGRD Term:	15.0	16.0	60.00	4.000
UGRD CUM:	27.0	51.0	107.10	3.967

FALL 2015 Univ of MO-Col Ugrd
Undeclared, Bus or Acctcy
Political Science-BA

Acctcy	2036	Accounting 1	A	3.0	
Econom	3229	Money,Banking & Fin Mrkt	A+	3.0	
Gn Hon	2010H	Honors Tutorial	A	1.0	H
Mangmt	3000	Principles of Managemnt	A	3.0	
Pol Sc	2100	State Government	A	3.0	
Pol Sc	2800	Liberty, Justice, Common Good	A	3.0	

	GPA Hrs Att	Hrs Ern	Qual Pt	GPA
UGRD Term:	16.0	16.0	64.00	4.000
UGRD CUM:	43.0	67.0	171.10	3.979

SPNG 2016 Univ of MO-Col Ugrd
Business Administration-BSBA
Political Science-BA

Acctcy	2037	Accounting 2	A	3.0	
Mangmt	4720	Experiential Entrepreneurship	A	3.0	
Pol Sc	3000	Intro Political Research	A	3.0	W
Ru Soc	1000	Rural Sociology	A	3.0	
T A M	2200	Science of Textiles	A	3.0	

	GPA Hrs Att	Hrs Ern	Qual Pt	GPA
UGRD Term:	15.0	15.0	60.00	4.000
UGRD CUM:	58.0	82.0	231.10	3.984

SUM 2016 Univ of MO-Col Ugrd
Undeclared, Bus or Acctcy
Political Science-BA

Bus Ad	3500	Professional Development	A	3.0	
Mrktng	3000	Principles of Marketing	A	3.0	
Pol Sc	4900	Beltway History & Politics	A	3.0	

	GPA Hrs Att	Hrs Ern	Qual Pt	GPA
UGRD Term:	9.0	9.0	36.00	4.000
UGRD CUM:	67.0	91.0	267.10	3.987

Brenda K. Selman

University Registrar

University of Missouri – Columbia

Official Transcript

Name: **Atasoy,Ashleigh Taylor**
Student ID: 16135300
Date of Birth: 09/06/XXXX
Soc. Sec. Number: XXX-XX-4671

This transcript has been produced for:

ASHLEIGH TAYLOR ATASOY

Course Number		Course Title	Grade	Hours	Remarks
FALL 2016	**Univ of MO-Col**	Ugrd			
	Business Administration-BSBA				
	Political Science-BA				
Financ	3000	Corporate Finance	A	3.0	
Mangmt	3540	Intro to Business Law	A+	3.0	
Mangmt	4201	Topics in Management	A	3.0	
		- Mang Case Analys & Presentatn			
Pol Sc	4150	The American Presidency	A	3.0	*
		GPA Hrs Att / Hrs Ern / Qual Pt / GPA			
UGRD Term:		12.0 / 12.0 / 48.00 / 4.000			
UGRD CUM:		79.0 / 103.0 / 315.10 / 3.989			
SPNG 2017	**Central Methodist University**				
Ec	314	Managerial Econ	A	3.0	T
SPNG 2017	**Univ of MO-Col**	Ugrd			
	Business Administration-BSBA				
	Political Science-BA				
Acctcy	2258	Comp-Based Data Systems	A+	3.0	
Gn Hon	2010H	Honors Tutorial	A-	1.0	H
		- Right to Pursuit of Happiness			
Mangmt	4010	Operations Management	A	3.0	M
Mangmt	4185	Problem in Management	S	1.0	
		- Cornell Leadership Prg			
		GPA Hrs Att / Hrs Ern / Qual Pt / GPA			
UGRD Term:		7.0 / 8.0 / 27.70 / 3.957			
UGRD CUM:		86.0 / 114.0 / 342.80 / 3.986			

Course Number		Course Title	Grade	Hours	Remarks
SUM 2017	**Univ of MO-Col**	Ugrd			
	Business Administration-BSBA				
	Political Science-BA				
Bus Ad	4500	Pdp - Internship	S	3.0	*
Financ	4630	Intro to Risk Mgmt & Insurance	A+	3.0	
		GPA Hrs Att / Hrs Ern / Qual Pt / GPA			
UGRD Term:		3.0 / 6.0 / 12.00 / 4.000			
UGRD CUM:		89.0 / 120.0 / 354.80 / 3.987			
FALL 2017	**Univ of MO-Col**	Ugrd			
	Business Administration-BSBA				
	Political Science-BA				
Financ	4010	Financial Management	A+	3.0	
Financ	4020	Investments	A	3.0	
Financ	4620	Inv Strgy of W Buffett	A	3.0	
Financ	4640	Enterprise Risk Management	A+	3.0	
Mangmt	4140W	Business Communication - Wi	A	3.0	W
		GPA Hrs Att / Hrs Ern / Qual Pt / GPA			
UGRD Term:		15.0 / 15.0 / 60.00 / 4.000			
UGRD CUM:		104.0 / 135.0 / 414.80 / 3.988			
SPNG 2018	**Univ of MO-Col**	Ugrd			
	Business Administration-BSBA				
	Political Science-BA				
Acctcy	4356	Financial Acct Concepts	A	3.0	
Mangmt	4185	Problem in Management	S	1.0	
		- Cornell Leadership Prg			
Mangmt	4970	Strategic Management	A	3.0	
Nep	1034	Intro to Human Nutrition	A+	3.0	
Nep	1340	Intro Exercise & Fitness	A	3.0	
		GPA Hrs Att / Hrs Ern / Qual Pt / GPA			
UGRD Term:		12.0 / 13.0 / 48.00 / 4.000			
UGRD CUM:		116.0 / 148.0 / 462.80 / 3.990			

Brenda K. Selman

University Registrar

University of Missouri-Columbia credit is expressed in semester hours.

Explanation of Remarks

E = Law Experiential Learning
C = Computer and Information Proficient
H = General Honors
M = A course including a substantial amount of mathematics reasoning
R = Repeated course, grade not figured in CUM GPA (eff. Fall 2000)
S = Service Learning
W = A course requiring 5000 words of writing and revision
* = An official change has been made to this record

Explanation of Grading System

A = Outstanding
B = Superior
C = Adequate
CR = Credit
D = Marginal
E = Exam
F = Unacceptable
H = Hearer or Auditor
HN = Honors - Medicine only, beginning Fall 1997
I = Incomplete
IP = In Progress
LC = Letter of Commendation - Medicine only, beginning Summer 1998
NR = Not Reported
PR = Preregistered
S = Satisfactory
S* = Satisfactory with Honors - Medicine only
T = Non UM system transfer course
U = Unsatisfactory
W = Withdrew Passing
WF = Withdrew Failing

The grade of D is not awarded to Graduate Students

Grade Point Values for Grading System

A = 4.00	D = 1.00
B = 3.00	F = 0.00
C = 2.00	WF = 0.00

Plus-Minus Grading Effective Fall 1995

A plus (+) sign following a letter grade adds an additional 0.33 grade points per credit hour. A minus (-) sign following a letter grade subtracts 0.33 per credit hour. Plus/Minus grade points apply to undergraduate students only.

Plus-Minus Grading Effective Fall 1998

A plus (+) sign following a letter grade adds an additional 0.3 grade points per credit hour, however no additional grade points are awarded for an A+. A minus (-) sign following a letter grade subtracts 0.3 per credit hour. Plus/Minus grade points apply to undergraduate students only.

Plus-Minus Grading Effective Fall 2011

Plus/Minus grade points apply to undergraduate and graduate students.

Law Numeric Grading System Effective Summer 2007

Important Note: Since 1987, the University of Missouri - Columbia has only used a numeric grading system. There are no definitive numeric grade to letter grade translations.

NOTE: To view the complete guide of transcript information go to http://www.transcripts.missouri.edu.

ADDRESS
University of Missouri-Columbia
Office of the University Registrar
125 Jesse Hall
Columbia MO 65211
573-882-4249

In April 2007, the School of Law converted from a 55-100 to a 65-100 grading scale. Grades are reflected on the 55-100 scale for Winter 2007 and all prior semesters. Grades are reflected on the 65-100 scale for Summer 2007 and all subsequent semesters. All cumulative GPAs were adjusted to the new scale by a one-time adjustment at the conclusion of the Winter 2007 semester.

NOTE: TO RECEIVE GRADUATE CREDIT IN ANY COURSE, THE STUDENT MUST HAVE BEEN ENROLLED IN GRADUATE SCHOOL OR AS A POST BACCALAUREATE SPECIAL. ALL COURSES TAKEN IN GRADUATE SCHOOL OR AS A POST BACCALAUREATE SPECIAL ARE GRADUATE LEVEL.

Course Numbering System Through Summer 2004

1 to 99	courses primarily for freshmen and sophomores
100 to 199	courses primarily for undergraduates: no graduate credit
200 to 299	courses for undergraduates, appropriate professional students, and for graduate students except those whose graduate major is in the department in which the course is offered.
300 to 399	courses for undergraduates, appropriate professional students, and for graduate students without restriction to major.
400 to 499	primarily for graduate students and appropriate professional students in special programs; undergraduates admitted only with the approval of the instructor of the course and the dean of the division in which the course is offered.
500 to 599	law, medicine or veterinary medicine courses

Course Numbering System Effective Fall 2004

0000 to 0999	skill development courses: courses that do not count towards degree requirement
1000 to 1999	freshman-level courses
2000 to 2999	sophomore-level courses
3000 to 3999	junior/senior level courses (upper division)
4000 to 4999	junior/senior level courses (upper division)
5000 to 6999	professional-level courses
7000 to 7999	beginning graduate courses
8000 to 8999	mid-level graduate courses
9000 to 9999	upper-level graduate courses

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without written consent of the student.

FEDERAL PUBLIC DEFENDER ORGANIZATION
EASTERN DISTRICT OF ARKANSAS

CAPITAL HABEAS UNIT

Lisa G. Peters
FEDERAL DEFENDER

CAPITAL HABEAS CHIEF
Scott W. Braden

ASSISTANT DEFENDERS
Julie Vandiver
John Williams
Nadia Wood

RESEARCH LAWYERS
Jason Kearney
Anisha Phillips

SENIOR INVESTIGATOR
Joseph Cummings

INVESTIGATORS
Tonya Willingham
David Richardson

ADMINISTRATIVE OFFICER
Kathy Swanson

COMPUTER SYSTEMS ADMINISTRATOR
Sharon Robinson

OPERATIONS ADMINISTRATOR
Jeri Robinson

ADMINISTRATIVE ASSISTANT
Dana Liner

ASSISTANT CSA
Mike Stagg

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1401 West Capitol
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Little Rock, Arkansas
72201

PHONE NUMBER
501-324-6114

FAX NUMBER
501-324-5630

June 8, 2021

In Re: Ashleigh Atasoy

To Whom It May Concern:

Ashleigh Atasoy was employed by my office from May 26, 2020 until -August 2020 as a legal intern in the Capital Habeas Corpus Unit. This office represents only death sentenced clients from state and federal courts. We primarily represent our clients in federal habeas corpus proceedings under Title 28 U.S.C. §§ 2254 and 2255.

Ms. Atasoy also worked closely with our trial unit. She was particularly instrumental in assisting in preparing a case for trial that was dismissed just as trial started. Because of the work she had done to discredit the government's case the government dropped the charges against the defendant. It was a stunning result here where the government seldom backs down.

Ashleigh was an outstanding intern. As you know the world had turned upside down that summer. We were not even sure that we could allow interns into our office. But Ashleigh came to Little Rock to work remotely, but locally, on the off chance she would be able to work in the office. Things slowly relaxed early that summer and she was at hand to work directly with us.

She drafted and edited parts of habeas corpus petitions and motions that are part of a federal habeas corpus proceeding. She did some amazing research going through dense trial transcripts putting together detailed information about things such as jury selection and issues of ineffective assistance of trial counsel. The work she did was so well done that it was used with very little editing in court pleadings. She was very informed on issues that surround death penalty cases. But, more impressive to me, was that she asked intelligent questions. You could tell from the quality of her questions that she was familiar with the issues faced by counsel in these types of cases.

Even though Arkansas's death row was closed to visitation that summer Ashleigh was able to build up a significant relationship with several clients. Through phone calls and the occasional video conference Ashleigh was able to talk to clients and answer their questions about the federal habeas corpus process and their death sentences. Discussing someone's execution requires a certain fortitude but Ashleigh did not hesitate to discuss these difficult matters.

She also was able to work with some mentally disturbed clients. She did not shy away from these abrasive clients.

Finally, Ashleigh was well liked by everyone in the office. She got along with all the lawyers and support staff. I think one of the things that impressed me the most about Ashleigh, even more than her legal skills, was that she took it upon herself to organize an office wide food drive. The local food bank here was struggling to feed the large number of unemployed people touched by the 2020 pandemic. Because of her, our office was very successful in raising numerous cartons of food for the food bank along with some much-needed cash. She saw a need, found a solution, and set it in action. Of all the interns that have come and gone through my office Ashleigh made the most powerful mark. I would recommend her for any position.

If you have any questions, please feel free to contact me. I am happy to talk about Ashleigh's skills and demeanor in very difficult situations.

Sincerely yours,

/s/ Scott W. Braden
Scott W. Braden
Chief, Capital Habeas Corpus Unit

May 15, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Ashleigh Atasoy

Dear Judge Hanes:

I write in support of Ashleigh Atasoy's application to clerk in your chambers. I had the pleasure of teaching Ashleigh throughout her first year at Berkeley Law, initially in Legal Research and Writing (fall semester) and then in Written and Oral Advocacy (spring semester). In both classes Ashleigh was successful, producing thoughtful and professional work. I am confident that Ashleigh will excel as a law clerk and an attorney.

Ashleigh's strong performance in my classes was the result of her academic curiosity and intense drive to learn. She arrived at law school enthusiastic to acquire skill in legal analysis and writing. She came frequently to my office hours with questions that demonstrated her commitment to the class and engagement in the material. In the fall semester, when we focused on objective writing, Ashleigh was tremendously coachable and implemented my suggestions about how her work could improve. Impressively, she even sought out additional assignments so that she could continue to practice research and writing during her breaks.

In the spring, we focused on advocacy, and this is where Ashleigh showed dramatic growth far beyond most of her classmates. The students in Ashleigh's class were required to advocate on behalf of a fictional petitioner seeking release of grand jury materials on political corruption and sexual misconduct in the California state capitol. My top comment on Ashleigh's project was, "Bravo!" Her argument was well-researched and clear, demonstrating wonderful attention to detail with specific facts. She successfully framed existing law accurately and yet also persuasively. I found her final brief persuasive, compelling, and professional.

In oral argument, Ashleigh demonstrated tremendous talent. I found her opening to be powerful—she spoke with a sense of urgency about the release of these fictional grand jury materials. When questioned, she used cases and factual analogy very effectively, clearly framing the issues. She maintained her composure when asked tough questions and showed an ability to clearly roadmap and structure each answer. Although Ashleigh had to participate in oral argument soon after the campus shut down due to the pandemic, she was undaunted. Ashleigh demonstrated grit and resilience by rising to the occasion and shining.

Ashleigh's outstanding oral argument performance in my class was no anomaly. Ashleigh became certified to represent clients in the Alameda County Clean Slate Court in California, winning four dismissals and felony reduction for prior DUIs and controlled substance convictions. She continued to refine her advocacy skills by competing as a member of the Berkeley Trial Team. Additionally, she coached first-year students as director of the 1L Bales mock trial competition. In this capacity, she taught students how to write and argue cases to a mock jury.

Finally, Ashleigh is a delightful person. I always looked forward to conversations with her because she is both likable and passionate. Ashleigh has a cheerful and good-natured personality that draws people to her. I got to know Ashleigh very well because she often visited office hours to talk about how she could make the most of her law school experience. Through these conversations, I was struck by Ashleigh's tremendous work ethic and vigor. Along with her personability, she maintains a fierce determination to learn and improve in all aspects.

I am confident that Ashleigh would be a wonderful addition to your chambers. She communicates clearly in writing and in person, and she's a joy to be around. I therefore recommend Ashleigh for a clerkship. Please do not hesitate to contact me at (510) 643-2739 or email me at kkumabe@law.berkeley.edu if I can provide any further information.

Sincerely,

Kerry S. Kumabe
Professor of Legal Writing
Legal Research, Analysis, and Writing Program
University of California, Berkeley School of Law

May 1, 2021

Re: Ashleigh Atasoy

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am happy to recommend my student and research colleague Ashleigh Atasoy for a judicial clerkship. She is a good student and very good writer, and will be a great prosecutor with a passion for fairness. She is a successful and energetic leader and participant in a number of law school and community service groups. And, she is a deeply thoughtful and caring person, whom I have been very glad to get to know.

Ashleigh was my student in two classes, Civil Procedure and Comparative Equality & Anti-Discrimination Law. In Civil Procedure she was a well prepared and active participant in class discussions, and frequent guest to my office hours. She was keenly interested in litigation. She wrote a good exam paper, and would have earned an Honors grade but for our overly strict curve.

In my fall 2021 Comparative Equality seminar Ashleigh wrote an excellent paper, earning an Honors grade. Her paper, tracing the origins of compulsory sterilization from the US eugenics movement through Nazi Germany to ICE camps on the US/Mexico border, was thoughtful, well crafted, and balanced. She recently described to me why the paper was important to her: “One of my greatest passions is eliminating gender discrimination around the world. Since women are the majority of sterilization victims, this paper explored the history and sexism that fuels judicial review of the issue.” In class, she was well prepared and insightful in our discussions of her fellow-students’ research projects.

Near the end of the fall semester I asked Ashleigh if she would like to work with me on a pro bono project, drafting an *amicus* brief for the Supreme Court of Japan. She readily agreed, though it required a significant sacrifice of her vacation time. We submitted our brief in support of a Japanese #MeToo advocate and human rights lawyer who was sued for defamation after she spoke out against sex trafficking. The Japanese Supreme Court is keenly interested in how the US regulates speech. Ashleigh researched and wrote the section on the defamation burden-shifting framework used in the United States, urging the court to accept the defense-friendly American test. She did an admirable job.

Given the academic demands of law school and the challenge of being a student during the pandemic, it would be reasonable to expect our students to be buried in their books. And Ashleigh’s grades demonstrate that she takes her studies seriously. But in addition, outside of (virtual) class she is an active leader of our community. In her 1L year she worked with supervising attorneys at the East Bay Community Law Center to provide housing advice to low-income tenants facing eviction; worked with the Reproductive Justice Project to assess California county compliance with new state legislation mandating sex education curriculum requirements; and worked with the Berkeley Police Review Project representing citizens in Berkeley City Police Review Commission hearings. This year, she is leading the Police Review Project, and has tripled the size of the project. And, she continues to work with the Reproductive Rights Project, continues doing pro bono work with the East Bay Community Law Center and is serving on the UC Berkeley Policing Working Group.

Ashleigh has informed me that after a clerkship she hopes to become a federal prosecutor. Her summer work and clinical work while here at Berkeley demonstrate her interest. By graduation, she will have participated in almost every aspect of the criminal justice system including victim services, local and federal public defense, local and federal prosecution, post-conviction habeas work, and appellate advocacy. This fall, she will extern with the DOJ Public Integrity Section, a group that prosecutes corrupt government officials, judges, and prison guards. Many of our students arrive at Berkeley with the goal of working in public service, only to be seduced by the appeal of big law. There’s no question in my mind but that Ashleigh will avoid that path.

In sum, Ashleigh Atasoy is making her mark at Berkeley Law as a strong student, an activist leader, and a participant in important community and service learning activities. I have every confidence that she will be an excellent lawyer, and (more to the point) an excellent law clerk. She has my highest recommendation.

Please feel free to contact me regarding this recommendation. I can be reached by email at doppenheimer@law.berkeley.edu or by phone (cell) at 510/326-3865.

David Oppenheimer - doppenheimer@law.berkeley.edu

Sincerely,

David B. Oppenheimer
Clinical Professor of Law

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This reply brief is based upon a case that was designed for use in an Advanced Legal Writing class. The research, analysis, and writing are substantially my own, including revisions based on comments provided by my professor.

I. INTRODUCTION

Solutions should solve problems. On July 1, 2020, Defendants adopted an English-only policy in their fast-food restaurant in response to complaints of sexually suggestive language from two Navajo employees. Defendants believed banning Navajo would curb profane comments, promote customer satisfaction, and improve supervision. But Defendants misdiagnosed the problem. Navajo was never the cause of employee and customer discomfort; offensive language was. When four Navajo employees felt exploited and refused to sign the policy, Defendants fired them. These women lost their jobs, livelihood, and community, while the initial offenders remain employed. The Equal Employment Opportunity Commission (EEOC) brings this action to seek relief for these women and other Navajo employees who were adversely impacted by Defendants' policy. Workplace policies—especially discriminatory ones—should solve problems. Defendants' English-only policy does not.

The EEOC opposes Defendants' motion for partial summary judgment for three reasons. First, the EEOC can establish a prima facie case of Title VII discriminatory impact. Defendants' English-only policy has a significant adverse effect on Navajo employees' privilege of conversing and creates a hostile work environment. Although employees are bilingual, they face substantial challenges speaking English. Code switching impairs their ability to control which language they speak, and it takes employees four times longer to speak English. Nevertheless, Defendants punish unintentional Navajo lapses. Historical context is crucial: Defendants' policy is reminiscent of an infamous era when government officials banned the Navajo language and

punished its use. The policy's tie to the past reinforces its draconian nature and imposes undue workplace hostility and tension.

Second, Defendants' policy does not qualify as a business necessity because it fails to advance legitimate industry goals. Mandatory English exacerbates ethnic tensions at the restaurant and hurts employee morale. The policy does not improve speed or accuracy, key determinants of customer service in the fast-food industry. Further, English does not improve Defendants' supervision because they are rarely present in the restaurant.

Third, even if Defendants' policy did serve business necessity, there are two less discriminatory alternatives. Defendants can ban offensive language and punish offenders appropriately. The restaurant can also rely on Navajo-speaking shift managers to monitor conversation since they already supervise employees and spend more time in the restaurant than Defendants themselves.

Defendants' English-only policy should solve—not exacerbate—problems. Instead, the policy mirrors historic Navajo persecution, alienates employees, and fails to promote any industry objective. At best, the policy is discriminatory, at worst, duplicitous. While Defendants mistake Navajo as their problem, the real issue—offensive language—remains ignored and unaddressed. Accordingly, this case must proceed to trial to obtain justice for Navajo employees.

II. STATEMENT OF FACTS

The Navajo language has withstood decades of oppression. Beginning in the late-1800s, the United States government forcibly removed Navajo children and placed them in reeducation schools where they banned the Navajo language. Declaration of Alexandra Aquino ¶¶ 4-5. Bureaucrats shaved children's hair, erased their names, and burned their possessions in the name of assimilation. *Id.* Children who refused to speak English were tortured. *Id.*

In the face of government persecution, the Navajo Nation endured. Its survival depended on the Navajo language, a central tenet of the tribe's cultural heritage and identity. *Id.* at ¶ 6. Today, the Navajo Nation continues to encourage members to speak its language and preserve its culture and history. *Id.*

The Wilsons operate their restaurant in the shadow of Navajo persecution. Located in Winslow, Arizona—a town of 9,500—Burger Depot lies outside the Navajo reservation and is a popular community restaurant. Declaration of Suzanne Nez ¶ 3; Declaration of Rob Wilson ¶ 4. Ninety percent of Burger Depot employees are Navajo. Nez Decl. ¶ 3. This is a result of the Wilsons' strategic decision to employ workers who can speak with Navajo patrons—over fifty percent of restaurant customers. *Id.* at ¶¶ 3, 8.

Burger Depot prioritizes speed, accuracy, and efficiency. Deposition of Rob Wilson 12:20-23. Customers want good food, fast. *Id.* To meet these expectations, cashiers must quickly and accurately relay orders to the kitchen. *Id.* at 13:3-5. Before the English-only policy, the Wilsons employed nineteen workers to collect orders and cook food in the kitchen. Wilson Decl. ¶ 13.

The Wilsons also employ three bilingual shift managers to supervise part-time since they are often away from the restaurant. *Id.* at 9:20-24. Rob Wilson regards each manager highly. *Id.* Burger Depot operates seven days a week, twelve hours a day. *Id.* at 9:8. Rob and Dan Wilson spend thirty hours supervising each week while the shift managers supervise the remaining fifty. *Id.* at 9:13-20. Clara Wilson handles administration and rarely visits the restaurant. *Id.* at 10:1-2.

For years, the Wilsons insisted employees speak English exclusively. Wilson Decl. ¶ 7. In January 2020, the Wilsons formalized their preference and posted "Please No Navajo" signs

throughout the restaurant. Wilson Depo. 10:17-19. They removed the signs by March but faced a new problem: plunging sales. *Id.* at 10:22, 11:6-10.

In April 2020, the Wilsons' problems multiplied. Customers began complaining of profane employee language, and workforce retention rates hit a record low. *Id.* In the face of declining sales, employee misconduct, and low morale, the Wilsons remained silent. Wilson Decl. ¶ 9. It was not until late May that a harassment allegation demanded action. Deposition of Lily Pierce 3:14-15.

When cashier Lily Pierce reported that two male employees directed sexually suggestive comments at her, the Wilsons finally acted. *Id.* at 3:23-25. Rob Wilson reprimanded the men, and the harassment stopped. *Id.* Over a month later, on July 1, the Wilsons nonetheless implemented the English-only policy. Wilson Decl. ¶ 13. The rule mandated English at all times except when speaking with native customers. *Id.* The Wilsons noted employees who failed to comply—even unintentionally—and repeat offenders forfeited shift preferences. Nez Decl. ¶ 5.

The English-only policy caused immediate disruption. Although the Wilsons told employees they could speak Navajo during breaks, the written policy—which employees were required to sign—did not include exceptions. Wilson Decl. ¶ 14. Four female employees felt "exploited" and refused to sign. Nez Decl. ¶¶ 6-8. The women had worked at Burger Deport for years and were offended that the Wilsons spoke German with impunity while Navajo was punished. *Id.* Despite the women's close ties and longtime employment, the Wilsons terminated them. *Id.* Ironically, the two men who "largely motivated the policy" retained their jobs. Wilson Decl. ¶ 14.

The Wilsons have since punished one employee for an unintentional Navajo slip. *Id.* at ¶ 16. On July 24, as Bill Redstone mopped the floor, he warned customers in Navajo: "Be Careful!

The floor is wet." *Id.* Clara Wilson happened to be in the restaurant during the incident and reprimanded Redstone for his use of Navajo. *Id.* Clara subsequently noted the incident in his file. *Id.*

Redstone's lapse may have been the result of code switching, a phenomenon where bilingual speakers unintentionally use their primary language. Aquino Decl. ¶ 7. Code switching cannot be "turned off," and bilingual speakers will often code switch immediately after they have spoken with others in their native language. *Id.*

Since July, little has changed at Burger Depot. Sales are stagnant; recruitment is dismal; and the harassment has not returned. Wilson Depo. 12:10-15; Declaration of Yolanda Benally ¶ 5. Despite the Wilsons' hopes of improving the restaurant with English, the policy has pushed out over twenty percent of employees—positions the Wilsons have been unable to fill. Wilson Decl. ¶ 15.

III. ARGUMENT

A. Summary judgment standard

A party may move for summary judgment when there is no genuine dispute over any material fact in a case. Fed. R. Civ. P. 56(c). To obtain summary judgment, the moving party must show "specific facts" from pleadings and discovery that demonstrate an absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). If the moving party proves there is no dispute, the burden shifts to the opposing party to establish an issue that must be submitted to a jury. *Anderson*, 477 U.S. at 252. Summary judgment is proper only if the non-moving party has "complete[ly] fail[ed]" to demonstrate an essential element of their case. *Celotex*, 477 U.S. at 317. The court must view the evidence in the light "most favorable" to the non-moving party.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). If reasonable minds could disagree on an essential piece of evidence, the case must proceed to trial. *Anderson*, 477 U.S. at 250-51.

B. There is a genuine dispute of material fact as the EEOC can establish a prima facie case of Title VII discriminatory impact, Defendants' policy fails to serve any business necessity, and the EEOC provides two less discriminatory alternatives.

Employers cannot deny employees terms, conditions, or privileges of employment because of national origin. 42 U.S.C. § 2000e-2(a)(1) (2012). When a workplace policy imposes a burdensome term or condition because of national origin, this creates a disparate impact. *Garcia v. Spun Steak*, 998 F.2d 1480, 1485 (9th Cir. 1993). If a plaintiff establishes a disparate impact prima facie case, the burden of proof shifts to the defendant, who may justify their policy with business necessity. *Id.* at 1486. The burden then returns to the plaintiff to identify less discriminatory alternatives that meet the defendant's business needs. *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1285 (9th Cir. 1981).

This Court should deny Defendants' motion for summary judgment because the EEOC can establish a prima facie case, and English fails to promote any business objective. Even if Defendants' policy *does* serve their business needs, there are two less discriminatory alternatives. Since reasonable minds may disagree over the evidence, this case must proceed to trial.

1. Defendants' English-only policy inflicts significant harm on Navajo employees' terms, conditions, and privileges of employment.

To establish a prima facie case, a plaintiff must prove that a "seemingly neutral" policy imposes adverse effects on employees' terms, conditions, or privileges of employment. *Spun Steak*, 998 F.2d at 1486. A plaintiff must show that these adverse effects are significant and that the general employee population is not affected by the policy to the same degree as the plaintiff.

Id. Here, the EEOC can establish a prima facie case because the English-only policy denies Navajo employees the privilege of conversing and creates a hostile work environment.

a. The English-only policy denies Navajo employees the privilege of conversing because they cannot readily speak English, and Defendants punish unintentional lapses.

The ability to converse is a privilege of employment. *Id.* at 1487. English-only policies impose a significant adverse impact on employees if they cannot readily speak English. *Id.* When noncompliance is not a matter of preference, and employers punish unintentional lapses, an English-only policy places a significant adverse burden on the privilege of conversing. *Id.* Whether compliance is volitional is a factual issue that cannot be determined at summary judgment. *Id.* at 1488.

The *Spun Steak* court held that an English-only policy did not impose a significant burden on the privilege of conversing because employees could easily speak English and comply with the rule. *Id.* Manufacturing employees experienced no difficulty speaking English and continued to converse with coworkers. *Id.* at 1487. The English-only rule imposed only a "mere[] inconvenience," rather than a significant burden, because the employer did not penalize "minor slips," and workers did not have to worry about punishment. *Id.* at 1488. The employer also offered accommodations for an employee who could not readily speak English. *Id.* The accommodations were appropriate since employees who speak another language at home may experience "difficulty" speaking English that amounts to an adverse impact. *Id.*

In *E.E.O.C. v. Premier Operator Services Inc.*, the court held that an English-only policy denied employees the right to converse since code switching jeopardized compliance. 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000). Code switching cannot be "turned off," so Hispanic employees faced a higher risk of discipline for noncompliance. *Id.*

Communication is an inherent aspect of the service industry. Unlike the manufacturing jobs in *Spun Steak*—where conversation was unnecessary—communication is a key responsibility at Burger Depot. *See* 998 F.2d at 1487; Wilson Depo. 13:3. Employees rely on constant and efficient dialogue to service food orders, transfer information to the kitchen, and announce completed meals. *See* Wilson Depo. 12:25, 13:2-5. Defendants' policy requires employees to speak English fast enough to meet the demands of the restaurant. *See id.* at 12:22.

This is impossible. Burger Depot employees cannot readily speak English at a rate that complies with the policy or demands of the restaurant. Although employees are bilingual, their English is four times slower than Navajo, and code switching makes it impossible for them to regulate their speech, as in *Premier Operator*. *See* 113 F. Supp. 2d at 1070; Wilson Decl. ¶ 6; Nez Decl. ¶ 6. These "difficult[ies]" plague every attempt at English. *See Spun Steak*, 988 F.2d at 1488. Because verbal communication is a cornerstone of Defendants' business, employees' English speed and code switching inhibit their ability to readily comply with the policy while meeting restaurant objectives. *See* Wilson Depo. 12:25, 13:2-5. Contrary to *Spun Steak*, Defendants offer no accommodations for employees who cannot readily speak English, even though ninety percent speak Navajo at home. *See* 988 F.2d at 1488; Nez Decl. ¶ 3.

Instead, Defendants punish unintentional lapses. When Bill Redstone used Navajo to warn customers of a wet floor, Defendants punished this minor slip and recorded the incident in his file. *See* Nez Decl. ¶ 10. Defendants punish all violations—even accidental ones—and withhold shift preferences from repeat offenders. *See* Nez Decl. ¶ 5. Speaking English is no "mere[] inconvenience," as in *Spun Steak*; it's a minefield. *See* 998 F.2d at 1488. By withholding shift preferences, Defendants can impose severe constraints on employees' parental obligations, community responsibilities, and personal commitments. *See* Nez Decl. ¶ 5. Likewise, by noting

every Navajo slip, Defendants create a "misconduct" index that provides ammunition against any employee at the drop of a hat. *See id.*

Defendants' reliance on *Gloor v. Garcia* is inapt. *See* 618 F.2d 264, 270 (5th Cir. 1980). *Gloor* analyzed an English-only policy with personal exceptions and failed to consider the effects of code switching. *See Premier Operator Services, Inc.*, 113 F. Supp. 2d at 1074 (criticizing the *Gloor* court's analysis). Here, Defendants implemented a blanket policy without exceptions, and code switching renders compliance impossible. *See* Nez Decl. ¶¶ 5, 7.

b. The English-only policy creates a hostile work environment by mirroring historic Navajo persecution and employing draconian enforcement measures.

An English-only policy adversely impacts employment conditions when it infuses the workplace with "ethnic tensions" or an atmosphere of discrimination. *Spun Steak*, 998 F.2d at 1488-89. Courts examine the "totality of the circumstances" to determine whether a policy creates a hostile work environment. *Id.* Workplace hostility is a factual question that courts cannot determine at the summary judgment stage. *Id.*

In *Maldonado v. City of Altus*, the court held that an English-only rule created a hostile work environment because the policy itself was an expression of hostility against Hispanics. 433 F.3d 1294, 1304-05 (10th Cir. 2006). The employer provided no clear reason for mandating English during employee breaks, lunch hours, and private conversations. *Id.* Without justification for banning Spanish, a reasonable person would assume the employer meant to target Hispanic employees and create an environment of inferiority and intimidation. *Id.* at 1306.

The *Premier Operator* court held that an English-only policy created workplace tension by subjecting Hispanic employees to "oppressive monitoring." 113 F. Supp. 2d at 1075. When six employees refused to sign the English-only policy, the employer immediately fired them. *Id.* at 1069. The remaining employees were "constantly on guard" against Spanish slips. *Id.* at 1075.

The terminations destroyed employee morale by causing disruption and feelings of alienation and inadequacy. *Id.* at 1070, 1073.

Defendants' English-only policy exacerbates decades of historic persecution of the Navajo Nation. *See* Aquino Decl. ¶ 4. Beginning in the late-1800s, the federal government attempted to Americanize and assimilate Navajo children by banning the use of the Navajo language. *See id.* Children who spoke Navajo were tortured. *See id.* As a result, the Navajo language became a form of resistance against government persecution and a cornerstone in the fight to preserve cultural identity. *See id.* at ¶ 6.

The English-only policy is the culmination of Defendants' ongoing assault on the Navajo language. Long before 2020, Defendants insisted employees speak English exclusively. *See* Wilson Decl. ¶ 7. Beginning in January 2020, Defendants displayed "Please, No Navajo" signs throughout the restaurant. *See* Nez Decl. ¶ 4. They offered employees no further context, only a blanket ban on a cornerstone of Navajo culture. *See id.* Without further justification, employees assumed the worst: the return of an infamous era of inferiority and a culture of discrimination, as in *Maldonado*. *See* 433 F.3d at 1306. Although Defendants allege their policy was a response to harassment, the "No Navajo" signs predated misconduct by several months. *See* Wilson Decl. ¶ 7. The policy itself is an expression of hostility against Navajo employees because it targets their language while Defendants speak German with impunity. *See Maldonado*, 433 F.3d at 1305; Nez Decl. ¶ 8.

Defendants' draconian enforcement creates a culture of fear. As in *Premier Operator*, Navajo employees constantly dread discipline since Defendants punish accidental language slips. *See* 113 F. Supp. 2d at 1075; Nez Decl. ¶ 5. Even though Defendants issued a verbal exception for breaks, the written policy—which employees signed—contained none. *See* Nez Decl. ¶ 5.

When four employees felt "exploited" by the policy and refused to sign, Defendants immediately fired them, just as the employer in *Premier Operator*. *See id.* at ¶¶ 6, 8; 113 F. Supp. 2d at 1069. The terminations amounted to over twenty percent of the restaurant's workforce and sent a chilling message to Navajo employees: this could be you. *See* Nez Decl. ¶¶ 6, 8. The terminated women had already weathered the culture of sexual harassment created by two men whose conduct "largely motivated" the English-only policy. *See* Wilson Decl. ¶ 14. Ironically, these men remained employed. *See id.*

2. Defendants cannot establish a business necessity defense because the English-only policy fails to improve workplace hostility, customer service, or supervision.

If a discriminatory English-only policy serves business necessity, it does not violate Title VII. 42 U.S.C. § 2000e–2(k)(1)(A)(I). To withstand scrutiny, the policy must have a "manifest relationship" with the position and industry in question. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 436 (1971). This standard is "rigorous," and defendants must present a compelling business justification to override a showing of discriminatory impact. *Gutierrez v. Mun. Ct.*, 838 F.2d 1031, 1041, 1044 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).[1]

Here, the English-only policy does not serve any business necessity. It fails to solve workplace tension because it does not address the root cause of the problem—offensive language. Since success in the fast-food industry is measured by speed, English also fails to improve customer service. Finally, Defendants are rarely present at the restaurant, so the policy makes no meaningful improvement in supervision.

a. The English-only policy does not improve working conditions because it fails to address Burger Depot's real problem—offensive language—and exacerbates hostility.

[1] *Gutierrez* is the only Ninth Circuit case that analyzes business necessity arguments for English-only policies. When the *Gutierrez* plaintiff quit her job before the appeal advanced to the Supreme Court, the Court vacated the issue as moot because she no longer worked with the employer. *See Spun Steak*, 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting). However, the case's reasoning remains unaffected even when it is vacated as moot. *See id.*

Reducing workplace fear and prejudice is not an acceptable business justification for English-only policies. *Id.* at 1043. However, English improves working conditions when it prevents employees from using other languages to alienate coworkers. *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 942 (E.D. Va. 1995).

The *Gutierrez* court held that an English-only policy increased racial tension. 838 F.2d at 1042. The policy "belittled" Spanish-speaking employees by banning their native language and increased hostility between Spanish- and non-Spanish-speaking coworkers. *Id*. English-speaking employees directed hostile racial remarks at their Hispanic coworkers, further increasing workplace tension. *Id.* Because the policy prompted the racial remarks and interpersonal tension, it did not improve working conditions. *Id.*

Similarly, the court in *Premier Operator* rejected an English-only policy because there was no evidence of the alleged discord the rule supposedly mitigated. 113 F. Supp. 2d at 1070. Rather than improving working conditions, the English-only policy caused "disruption" and led to feelings of "alienation and inadequacy." *Id.*

In *Long*, the court held that an English-only policy improved the workplace because it prohibited four employees from using Spanish to secretly insult coworkers. 894 F. Supp. at 942. Spanish conversations jeopardized office efficiency by alienating English-speaking employees who felt uncomfortable they could not understand coworkers. *Id.* The policy mitigated workplace unease, improved coworker relationships, and promoted efficiency by requiring all employees to speak and understand a common language. *Id.*

Defendants' English-only policy fails to improve working conditions because it ignores the root cause of tension: offensive language. When customers and employees complained about the environment, they never mentioned the Navajo language. *See* Wilson Decl. ¶ 9. Rather, they

criticized two male employees who made offensive and sexually charged comments. *See id.* Unlike *Long*, Burger Depot's problem was not another language. *See id.*; 894 F. Supp. at 942. Even if Navajo *was* the issue, all complaints ended over a month before Defendants adopted mandatory English. *See* Pierce Depo. 3:24-25. By July 2020, there was no problem left to solve, and the policy instead caused "disruption." *See Premier Operator*, F. Supp. 2d at 1070; Nez Decl. ¶ 5.

Ironically, Defendants' policy exacerbated hostility. The rule "belittled" and "exploited" Navajo employees, as in *Gutierrez* and *Premier Operator*. *See* 838 F.2d at 1042; 113 F. Supp. 2d at 1070; Nez Decl. ¶ 8. Despite retention and recruitment problems, Defendants terminated four female employees who felt exploited by the policy. *See* Wilson Decl. ¶¶ 10, 15. These women were longtime employees who made up over twenty percent of the workforce. *See* Nez Decl. ¶ 7. Even now, Defendants cannot find staff replacements. *See* Wilson Decl. ¶ 10.

Defendants' reliance on *Long* is mistaken because the offensive comments at Burger Depot were spoken in the restaurant's majority language. Unlike *Long*—where only a few employees understood Spanish—ninety percent of restaurant personnel and over half of customers are Navajo-speakers. *See* 894 F. Supp. at 937; Nez Decl. ¶ 3. This case is not about English-speakers' discomfort with a minority language; rather, it concerns fellow Navajos' complaints about offensive comments they *understood*. *See Long*, 894 F. Supp. at 942; Wilson Decl. ¶ 9. Whereas the *Long* employees used Spanish to ridicule coworkers in secret, Burger Depot comments were public. *See* 894 F. Supp. at 942; Wilson Decl. ¶ 9. *Long* concerns different facts and a different problem in a different context. *See* 894 F. Supp. at 942.

b. The policy fails to improve customer service because English does not advance the fast-food industry goals of efficiency and accuracy.

English-only policies improve customer service when English promotes industry goals. *E.E.O.C. v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005); *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599, 614 (S.D.N.Y. 2009).

The *Sephora* court held that customer service justified an English-only policy because it made retail employees "approachable" to customers. 419 F. Supp. 2d at 410, 417. Approachability and helpfulness are "central" job requirements in retail. *Id.* When customers do not understand the language salespeople are speaking in, they may hesitate to approach employees with product questions. *Id.* at 416. Mandatory English promoted approachability by eliminating customer discomfort and signaling that employees were available to the public. *Id.* at 417; *see also Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (holding that mandatory English qualified as a business necessity because it avoided "alienating" church members who may have felt uncomfortable approaching Polish-speaking church staff).

In *Pacheco*, the court upheld an English-only policy because respect was the hospital's guiding principle, and the rule promoted this goal. 593 F. Supp. 2d at 622. Patients endured "great personal stress," and Spanish may have led them to believe employees were hiding negative comments about them. *Id.* English promoted respect by revealing employee conversations to patients and demonstrating that workers were not speaking ill of them. *Id.*

English does not promote any fast-food industry objective. In fast food, success and customer satisfaction are defined by speed, accuracy, and efficiency—not "approachability." *See Sephora*, 419 F. Supp. 2d at 417; Wilson Depo. 12:20-23; *see also Kania*, 14 F. Supp. 2d at 736. English hinders these goals since employees speak the language four times slower than Navajo and cannot meet customer expectations efficiently in English. *See* Nez Decl. ¶ 6. Indeed, Defendants' policy has failed to improve sales. *See* Wilson Depo. 12:15.

English fails to improve customer service because the Navajo language does not offend patrons. Unlike *Sephora* and *Pacheco*, where foreign languages offended English-speaking customers and jeopardized industry goals, most Burger Depot customers are Navajo themselves. *See* 419 F. Supp. 2d at 416; 593 F. Supp. 2d at 622; Nez Decl. ¶ 3. Winslow's proximity to the Navajo Nation ensures all customers are familiar with its language and culture. *See* Wilson Decl. ¶ 4. Because the town borders the reservation, Navajo is not offensive to Burger Depot patrons, and English does little to improve customer satisfaction. *See id.*

c. The English-only policy does not improve supervision because Navajo is an essential function of employee jobs, and Defendants are rarely present in the restaurant.

Supervision justifies an English-only policy when English meaningfully improves the ability to monitor employees. *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993). However, if employees' jobs require another language, English-only policies do not improve supervision. *Gutierrez*, 838 F.2d at 1043.

The *Gutierrez* court held that an English-only policy failed to improve supervision because employees' jobs required them to speak Spanish most of the time. *Id.* Spanish was the community's primary language, and supervisors required employees to speak with the public in their native language. *Id.* An English-only policy was "illogical" and "unpersuasive" because most employee conversations required Spanish. *Id.* The employer's alleged desire to monitor inter-office communication was "disingenuous at best" since they already accepted supervisors' inability to monitor most employee conversations. *Id.*

In *Gonzalez*, the court held that supervision justified a narrow English-only policy because the supervisor worked within earshot of subordinates. 1991 WL 11009376, at *2. After employees and clients complained of inappropriate Spanish comments, an English-speaking

supervisor became concerned with his inability to monitor bilingual conversations. *Id.* The comments occurred in a central conference room and were easily overheard throughout the small building. *Id.* English improved supervision since the policy applied only to a single room the director could easily monitor. *Id.*

Defendants hired Navajo employees to speak with customers in their native language. *See* Nez Decl. ¶¶ 3, 8. Like the supervisors in *Gutierrez*, Defendants cannot speak Navajo and rely on employees to communicate with the non-English-speaking public—over fifty percent of customers. *See id.*; 838 F.2d at 1043. Even with the policy, Defendants cannot monitor most customer interactions since they do not understand Navajo. *See* Nez Decl. ¶ 3. Mandatory English is "illogical" because it has no effect on the supervision of most customer communications. *See Gutierrez*, 838 F.2d at 1043.

English does not meaningfully improve Defendants' supervision because they are rarely present in the restaurant. Although Burger Depot is open over eighty hours a week, Rob and Dan Wilson spend less than half that time in the restaurant—only thirty-five percent of restaurant hours. Wilson Depo. 9:8-18. Clara Wilson handles administrative tasks and is "not often" at Burger Depot. *Id.* at 10:1-2. In other words, Defendants are absent most of restaurant hours and rely on shift managers for supervision. *See id.* at 9:8-18, 10:1-2. Unlike the narrow *Gonzalez* policy, Defendants' rule applies to the entire restaurant, even areas that are not easily overheard by others. *See* 1991 WL 11009376, at *2; Wilson Decl. ¶ 13. Even if Defendants are present, the restaurant's loud and fast-paced nature prohibits their ability to overhear and monitor employee conversations. *See* Wilson Depo. 12:20-23. One person cannot simultaneously monitor conversations across the kitchen, dining area, break room, and front counter. *See id.* at 13:2-5.

3. Defendants can ban offensive language and rely on bilingual shift managers as less discriminatory alternatives to the English-only policy.

If Defendants establish a business justification for their English-only policy, the EEOC must present less discriminatory alternatives. *Contreras*, 656 F.2d at 1285. Acceptable alternatives accomplish the same business purpose as the disputed policy and are "equally effective" at meeting a business necessity. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993). Alternatives cannot be equally effective if they are substantially more expensive than the disputed policy. *Rudder v. District of Columbia*, 890 F. Supp. 23, 46 (D.D.C. 1995).

The *Sephora* court rejected a less discriminatory English-only alternative because it failed to address when English should be spoken. 419 F. Supp. 2d at 418. When the plaintiff proposed a mandatory greeting policy to make customers comfortable, the suggestion "fail[ed] entirely" since employees had no guidance on when to speak different languages. *Id.* In *Prado v. L. Luria & Sons, Inc.*, the court rejected plaintiff's alternative to an English-only policy because it found that the exclusive promotion of bilingual workers to supervisor was discriminatory. 975 F. Supp. 1349, 1352 (S.D. Fla. 1997).

Defendants should replace the English-only policy with a ban on offensive language since inappropriate comments—not Navajo—are the root cause of hostility and declining sales. Since March 2020, customers and employees have complained of verbal harassment and profane language. *See* Wilson Depo. 11:5-9, 13-15. Parties were not offended by the use of Navajo—they are Navajo themselves—but rather, the offensive nature of the comments. *See id.*; Pierce Depo. 1:11. To best address this problem, Defendants should ban offensive language and require employees to speak with customers in their preferred language. This alternative satisfies *Sephora*'s concern by providing a clear directive indicating when to speak English. *See* 419 F. Supp. 2d at 418. It also eliminates customer and employee discomfort by holding offenders

accountable for harassment and profane language. *See Long*, 894 F. Supp. at 933. This alternative may even enable the four terminated women to return to work and resolve the current employee shortage. *See* Wilson Depo. 11:6-8.

Defendants should also increase their reliance on bilingual shift managers who can better supervise employee conversations. The shift managers already supervise employees most restaurant hours—nearly double the amount of time Defendants are present—and require no additional expense. *See id*. at 9:8-20. Because shift managers already hold these positions, and the alternative does not call for exclusive promotion of bilingual employees, the policy is not discriminatory. *See Prado*, 975 F. Supp. at 1352. The Navajo managers will immediately improve supervision since they can monitor conversations more effectively than the monolingual Defendants. *See id.*; *see also Gutierrez*, 838 F.2d at 1043 (finding that the "best way" to improve supervision of Spanish-speaking employees is to hire Spanish-speaking supervisors).

IV. CONCLUSION

Defendants' English-only policy creates problems rather than solutions. Instead of targeting the root cause of complaints—offensive language—the policy exacerbates racial hostility against the Navajo language. The EEOC files this response brief on behalf of alienated Navajo employees. This case must proceed to trial to obtain justice for Navajo employees who were hurt—not healed—by Defendants' policy.

Applicant Details

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Citizenship Status	**U. S. Citizen**
Email Address	**mackenziebadger@gmail.com**
Address	**Address** Street **506 sw 34th street, Apt 24** City **GAINESVILLE** State/Territory **Florida** Zip **32607** Country **United States**
Contact Phone Number	**5613397245**

Applicant Education

BA/BS From	**Virginia Commonwealth University**
Date of BA/BS	**December 2013**
JD/LLB From	**University of Florida Fredric G. Levin College of Law** **https://www.law.ufl.edu/careers**
Date of JD/LLB	**May 12, 2021**
Class Rank	**10%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bornstein, Stephanie
bornstein@law.ufl.edu
352-273-0957
Quinn, Mae
mae.quinn@law.ufl.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

2307 Boulder Run Court
Henrico, VA 23238

May 24, 2021

The Honorable Elizabeth W. Hanes
Magistrate Judge
United States District Court
for the Eastern District of Virginia
701 E. Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a 2021 graduate of the University of Florida Levin College of Law and I will be a first-year healthcare advisory associate with McDermott Will & Emery's Miami office following the July Bar exam. My family owns a small business and lives in the Richmond area, and I hope to return to the state to practice law in the future, specifically as a public defender. My desire to work with a magistrate judge who previously served indigent communities as a public defender has compelled me to apply for your 2022 clerkship position.

During my second year in law school, I enrolled in a complex federal criminal investigation course taught by the Honorable Daniel C. Irick, Federal Magistrate Judge for the U.S. District Court for the Middle District of Florida. The course examined the investigative process as well as the procedures for attaining warrants. Judge Irick used his experience as an Assistant United States Attorney and Magistrate Judge to pose open questions of law in class. Engaging in challenging and thoughtful discussions about complex matters of law was exhilarating and led me to pursue an externship with a magistrate judge.

Throughout my third year of law school, I externed for the Honorable Dave L. Brannon in The Southern District of Florida, Palm Beach Division. While in Judge Brannon's chambers, my substantial writing projects focused on issues involving splits in the law, on matters which the Eleventh Circuit was silent, and on other emerging issues that presented novel questions. One such issue dealing with the timeliness of a habeas petition is attached as a writing sample. Judge Brannon relied on this analysis, and it was integrated into the final order. I drafted countless detention orders based on pretrial service reports, testimony from agents, and Judge Brannon's comments during the proceedings. These orders were filed with the court after Judge Brannon's review. I found this work to be interesting, intellectually stimulating, and impactful to the community. This experience solidified my desire to serve in a magistrate judge's chambers after graduation from law school.

I have enclosed my resume, transcript, and two letters of recommendations from Professor Stephanie Bornstein and Professor Mae C. Quinn. Judge Irick and Judge Brannon have indicated their support and willingness to be contacted by telephone. Judge Brannon may be reached at (561) 803-3470. Judge Irick may be reached at (407) 835-3840. Thank you for your time and consideration.

Respectfully,
Mackenzie Badger
Mackenzie Badger
Enclosures: Four (4)

MACKENZIE BADGER

• 2307 Boulder Run Court, Henrico, Va. 23238 • (561) 339-7245 • MBadger@ufl.edu

EDUCATION

University of Florida Levin College of Law, Gainesville, FL — May 2021
J.D.

GPA: 3.60
Class Rank: Top 12% (37/278)
Honors: Governor Scholarship (100% Tuition)
Book Award: Criminal Law, Fall 2019
Book Award: Depositions, Fall 2020
Pro Bono Outstanding Achievement Award: < 150 hours
Activities: Trial Team, Chair of Special Events
Alternative Pro Bono Spring Break, 2019

Virginia Commonwealth University, Richmond, VA — Dec. 2013
Bachelor of Arts in History (GPA: 3.69)
Honors: Dean's List (two semesters)
Activities: Participated in the Reserve Officer Training Corps

Pierce Community College, Woodland Hills, CA — Nov. 2011
Associate of Arts in History (GPA: 3.2)
Honors: Dean's List (two semesters)

EXPERIENCE

McDermott Will & Emery, Miami, FL — Tentative Start: Oct 4, 2021
Healthcare Industry Advisory Associate

U.S. District Court for the Southern District of Florida, Palm Beach, FL — Aug. 2020–May 2020
Judicial Intern for the Honorable Dave Lee Brannon
Drafted memoranda dealing with complex issue of habeas petition timeliness, on which the Eleventh Circuit was silent and other districts were split. Proposed orders and reports and recommendations under the direction of law clerks.

McDermott Will & Emery, Miami, FL — July 2020
Summer Associate
Summer Associate position was reduced to a two week program in July due to Covid-19

Deason Criminal Justice Reform Center, University Park, TX — June 2020–July 2020
Pro Bono Legal Researcher
Researched the COVID-19 responses of Oregon and Washington state courts from each given state's Supreme Court to the county level, in addition to the responses of local law enforcement, state attorney, and public defender offices. Drafted a forty-page report on the findings.

U.S. District Court for the Middle District of Florida, Orlando, FL — May 2019–July 2019
Judicial Intern for the Honorable Roy B. Dalton
Researched and drafted memoranda and proposed orders regarding motions to dismiss for failure to state a claim and motions to remand. Reviewed preliminary sentencing reports and sentencing guidelines for hearings. Performed legal research into topics such as, email service to foreign countries.

Kern Valley Hotshots, Bakersfield, CA — Apr. 2017–Oct. 2017
Firefighter / Saw Team Member
Directed a twelve-person module in containment and mop-up operations while ensuring our section of fire was extinguished upon extraction. Participated in two weeks of leadership training. Performed physical labor in austere environments for two to three-week periods.

MACKENZIE BADGER

2307 Boulder Run Court, Henrico, VA 23238
(561) 339-7245 • MBadger@ufl.edu

UNOFFICIAL GRADE REPORT

Semester/Courses	Credit Hours	Grade
Fall Semester 2018:		
Property	4.0	A
Torts	4.0	A-
Criminal	3.0	A (book award)
Legal Writing, Research, and Appellate Advocacy Program	2.0	B
Introduction to Lawyering	3.0	Pass
Spring Semester 2019:		
Civil Procedure	4.0	A
Contracts	4.0	A
Constitutional Law	4.0	A
Appellate Advocacy	2.0	B
Research	1.0	B+
Fall Semester 2019:		
Public Health Law	3.0	B+
Business Enterprise Survey	5.0	B+
Professional Responsibility	3.0	B+
Problem Solving Court	2.0	B+
Spring Semester 2020:		
Police Practices	3.0	P
Evidence	4.0	P
Trial Practice	4.0	P
Federal Sentencing	1.0	A-
Complex Fed. Crim. Investigations	2.0	P
Fall Semester 2020:		
Depositions Strategies	1.0	A (book award)
Externship – The Honorable Dave Lee Brannon	12.0	P
Legal Drafting	2.0	B-
Trial Practice Teaching Assistant	1.0	P
Spring Semester 2021:		
Externship – The Honorable Dave Lee Brannon	2.0	P
The Business of Life with a Law Degree	1.0	A-
Pretrial Practice	3.0	Pending
Wrongful Convictions Clinic	5.0	Pending
Trial Team	3.0	P
Trial Practice Teaching Assistant	1.0	P
Cumulative GPA		**3.60**
Rank		**37/273**

Student No: V00602354 Date of Birth: 08-JAN Date Issued: 22-JUL-2014
EXPR

Record of: Mackenzie Clark Badger Page: 1
Issued To: Mackenzie C. Badger
3690 Eddingham Ave
Calabasas, CA 91302-5831

Course Level: Undergraduate
Student Type: Continuing

Program of Study
Bachelor of Arts
Program : History-BA
College : Humanities and Sciences
Major : History

Degree Awarded Bachelor of Arts 21-DEC-2013
Primary Degree
Program : History-BA
College : Humanities and Sciences
Major : History
Inst. Honors: Cum Laude

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

201010 Los Angeles Pierce College

ANTH 301	HUMAN EVOLUTION WI	3.00	TR
ARTS 1XX	HIST MOTION PICTURES	3.00	TR
ECON 203	INTRODUCTION TO ECONOMICS	3.00	TR
FRLG 101	FOREIGN LANGUAGES:	4.00	TR
HIST 101	SURVEY OF EUROPEAN HISTORY	3.00	TR
HIST 102	SURVEY OF EUROPEAN HISTORY	3.00	TR
HIST 110	SURVEY OF LATIN AMERICAN HIST	3.00	TR
HPEX 1XX	WEIGHT TRAINING	1.00	TR
MATH 141	ALGEBRA WITH APPLICATIONS	5.00	TR
PSYC 101	INTRODUCTION TO PSYCHOLOGY	3.00	TR
PSYC 308	STRESS AND ITS MANAGEMENT	3.00	TR
SPCH 121	EFFECTIVE SPEECH	3.00	TR
STAT 210	BASIC PRACTICE OF STATISTICS	4.00	TR
UNIV 111	FOCUSED INQUIRY I	0.00	TR
UNIV 112	FOCUSED INQUIRY II WI	3.00	TR

Ehrs: 44.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

201210 Los Angeles Pierce College

HIST 103	SURVEY OF AMERICAN HISTORY	3.00	TR
HIST 104	SURVEY OF AMERICAN HISTORY	3.00	TR
HIST 109	SURVEY OF LATIN AMERICAN HIST	3.00	TR

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R

Transfer Information continued:

HPEX 1XX	WEIGHT TRAINING	1.00	TR
UNIV 200	WRITING & RHETORIC WORKSHOP II	3.00	TR

Ehrs: 13.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

200920 Palm Beach State College

ENGL 1XX	COLLEGE COMPOSITION I	3.00	TR
HPEX 2XX	HEALTH CONCEPT	3.00	TR
MATH 1XX	COLLEGE ALGEBRA	3.00	TR
PHYS 103	ELEMENTARY ASTRONOMY	3.00	TR
THEA 113	ACTING I	3.00	TR

Ehrs: 15.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

INSTITUTION CREDIT:

Spring 2012
Humanities and Sciences
History
Transfer

ENGL 215	TEXTUAL ANALYSIS	3.00	A	12.00
FREN 101	ELEMENTARY FRENCH	4.00	B	12.00
HIST 201	HIST DET:COLONIAL ENCOUNTERS	3.00	A	12.00
HIST 391	TOP: INDIAN SLAVERY	3.00	A	12.00
INSC 201	ENERGY!	3.00	A	12.00

Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 60.00 GPA: 3.75
Dean's List
Good Standing

Fall 2012
Humanities and Sciences
History
Transfer

FREN 102	ELEMENTARY FRENCH	4.00	A	16.00
HIST 300	INTRO HISTORICAL STUDY WI	3.00	A	12.00
HIST 310	EURO:ABSOL & ENLTNMT 1648-1815	3.00	A	12.00
HIST 345	CIVIL WAR & RECONSTRUCTION	3.00	A	12.00
MILS 301	MILITARY SCI &LEAD: LEAD &PROB	3.00	A	12.00

Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00
Dean's List
Good Standing

********** CONTINUED ON PAGE 2 **********